



Competition Bureau
Canada

Bureau de la concurrence
Canada

Immunity and Leniency Programs under the Competition Act

This publication is not a legal document. It is intended to provide general information and is provided for convenience. To learn more, please refer to the full text of the Acts or contact the Competition Bureau.

For information on the Competition Bureau's activities, please contact:

Information Centre
Competition Bureau
50 Victoria Street
Gatineau QC K1A 0C9

Tel.: 819-997-4282

Toll free: 1-800-348-5358

TTY (for hearing impaired): 1-866-694-8389

Fax: 819-997-0324

Website: www.competitionbureau.gc.ca

This publication can be made available in alternative formats upon request. Contact the Competition Bureau's Information Centre at the numbers listed above.

This publication is also available online in HTML at:

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html>

Permission to reproduce

Except as otherwise specifically noted, the information in this publication may be reproduced, in part or in whole and by any means, without charge or further permission from the Competition Bureau provided due diligence is exercised in ensuring the accuracy of the information reproduced; that the Competition Bureau is identified as the source institution; and that the reproduction is not represented as an official version of the information reproduced, nor as having been made in affiliation with, or with the endorsement of the Competition Bureau. For permission to reproduce the information in this publication for commercial redistribution, please [Apply for Crown Copyright Clearance](#) or write to:

Communications and Marketing Branch

Innovation, Science and Economic Development Canada

C.D. Howe Building

235 Queen Street

Ottawa, ON Canada

K1A 0H5

Email: ISED@Canada.ca

Cat. No. Iu54-71/2018E-PDF

ISBN 978-0-660-27910-7

2018-09-27

Aussi offert en français sous le titre Programmes d'immunité et de clémence en vertu de la Loi sur la concurrence



PREFACE

The purpose of the Immunity and Leniency Programs (Programs) is to uncover and stop criminal anti-competitive activity prohibited by the *Competition Act* (Act)¹ and to deter others from engaging in similar behaviour. The Programs are administered jointly by the Director of Public Prosecutions (DPP) and the Commissioner of Competition (Commissioner). Under the Programs, the Competition Bureau (Bureau), headed by the Commissioner, is responsible for investigating alleged wrongdoing and making recommendations to the Public Prosecution Service of Canada (PPSC) to grant immunity and leniency. The PPSC, under the direction of the DPP, is responsible for the decision to enter into an immunity or plea agreement with an applicant in accordance with the principles set out in the *Public Prosecution Service of Canada Deskbook*² (PPSC Deskbook). These responsibilities are discharged by the Bureau and the PPSC, in mutual recognition of the other's independence.

Immunity is an extraordinary grant by the Crown to forego prosecution, while leniency is a discretionary decision by the Crown to recommend a reduction of the sanctions to be imposed by a court. The PPSC and the Bureau recognize that it is in the public interest to offer immunity from prosecution or lenient treatment to a participant who is willing to terminate its participation in serious criminal activity under the Act and to provide significant cooperation to an investigation. The PPSC and the Bureau also recognize that clarity, predictability and transparency are crucial to the effective operation of the Programs, because they entail a sincere commitment by an immunity or leniency applicant to address illegal wrongdoing and to fully cooperate with the Bureau and the Crown in investigating and prosecuting others implicated in the illegal activity.

These Programs have proven to be powerful means of detecting criminal activity. The Programs' contributions to effective enforcement are unmatched. Their continued appeal as an incentive for those who would otherwise remain undercover to disclose their criminal behaviour is pivotal to the Bureau's enforcement efforts. As part of the Bureau's and the PPSC's commitment to respond to changes in the legal and enforcement environment, the Commissioner in conjunction with the DPP are pleased to present this updated version with adjustments designed to clarify the Bureau's approach and to keep pace with the changes that have affected the Programs' ability to provide transparency and predictability to those who would cooperate with the Bureau and the PPSC. We trust the updated Programs will enhance Canada's ability to detect, investigate and prosecute criminal behaviour in the field of competition law.

Matthew Boswell

Interim Commissioner of Competition

Kathleen Roussel

Director of Public Prosecutions

¹ *Competition Act*, R.S.C. 1985, c. C-34.

² Available online at <http://www.ppsc-sppc.gc.ca>.

TABLE OF CONTENTS

INTRODUCTION	6
ROLES OF THE COMMISSIONER, THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE COURTS	7
PART ONE: THE IMMUNITY PROGRAM	8
OBTAINING IMMUNITY	8
Timing and required information	8
Eligibility	9
Subsequent to the Immunity Application	10
Cooperation Required	10
IMPACT OF CORPORATE IMMUNITY ON DIRECTORS, OFFICERS, EMPLOYEES AND AGENTS	13
Obtaining the Cooperation of Directors, Officers, Employees and Agents	13
THE IMMUNITY PROCESS	14
FAILURE TO COMPLY WITH THE OBLIGATIONS OF THE GRANT OF INTERIM IMMUNITY	21
PART TWO: THE LENIENCY PROGRAM	21
OBTAINING LENIENCY	21
LENIENCY IN SENTENCING: DETERMINING THE RECOMMENDED FINE	23
IMPACT OF LENIENCY ON DIRECTORS, OFFICERS, EMPLOYEES AND AGENTS	26
THE LENIENCY PROCESS	28
CANCELLATION OF LENIENCY MARKER AND WITHDRAWAL FROM THE LENIENCY PROGRAM	34
LEGAL PRIVILEGE	34

PART THREE: MATTERS COMMON TO THE IMMUNITY AND LENIENCY PROGRAMS	34
TREATMENT OF INFORMATION	34
INTERNATIONAL CRIMINAL ANTI-COMPETITIVE ACTIVITY	36
PRIVATE CIVIL ACTIONS	36
HOW TO CONTACT THE COMPETITION BUREAU.....	37
APPENDIX 1: CRIMINAL PROVISIONS OF THE COMPETITION ACT	38
APPENDIX 2: INFORMATION CHECKLIST	41
APPENDIX 3: TEMPLATE DOCUMENTS.....	44

INTRODUCTION

1. The *Competition Act* (Act) is a law of general application that establishes basic principles for the conduct of business in Canada. The Act maintains and encourages competition:
 - a) to promote the efficiency and adaptability of the Canadian economy;
 - b) to expand opportunities for Canadian participation in world markets while recognizing the role of foreign competition in Canada;
 - c) to ensure small and medium-sized enterprises have equal opportunity to participate in the Canadian economy; and
 - d) to provide consumers with competitive prices and product choices.
2. The Commissioner is the head of the Bureau and has the authority to administer and enforce the Act. The Bureau is the organization that carries out investigations under the Act.
3. The Act includes criminal provisions³ that prohibit anti-competitive business activities, including conspiracies between competitors or potential competitors to fix prices, allocate markets or restrict output (e.g., price fixing, market allocation or output restriction agreements) and bid-rigging, as well as deceptive marketing practices and false or misleading representations. The criminal provisions of the Act are serious criminal offences that can carry significant fines and terms of imprisonment. For example, offending the conspiracy provision carries a maximum fine of \$25 million or imprisonment of up to 14 years in prison, or both.
4. The Bureau, like other law enforcement agencies, recognizes the importance of programs that contribute to the detection, investigation and prosecution of serious crimes. This Bulletin details the Bureau's approach to recommending immunity and leniency in sentencing for self-reported violations of the Act for companies and individuals that cooperate in the investigation and prosecution of offences.
5. This Bulletin describes the roles and responsibilities of the Commissioner and the DPP⁴, the requirements an applicant must satisfy to obtain immunity or leniency, the impact of corporate immunity or leniency on directors, officers, employees and agents, the steps in the respective immunity or leniency process and the impact of failure to comply with the requirements of an immunity or plea agreement. It addresses timing issues, including those that may arise in the context of international criminal activity and multi-jurisdictional investigations, and sets out the confidentiality assurances that the Bureau will make to an applicant.
6. This Bulletin does not provide legal advice. It expands upon and supersedes earlier bulletins and public statements by the Bureau. Readers should refer to the Act when questions of law arise and obtain legal advice when appropriate.
7. This Bulletin is divided into three parts: Part One describes the Immunity Program, Part Two describes the Leniency

³ See Appendix I for relevant provisions.

⁴ Pursuant to the *Director of Public Prosecution Act*, the DPP's mandate includes initiating and conducting prosecutions under federal jurisdiction and advising law enforcement agencies and investigative bodies on prosecutions and investigations. The DPP is the head of the PPSC. The PPSC is independent of the Department of Justice Canada and reports to Parliament through the Attorney General.

Program and Part Three describes certain matters common to both Programs. As provided below, the Immunity Program is available only to the first party (e.g. a cartel or deceptive marketer) to self-report an offence under the Act whereas the Leniency Program is available to other parties to a cartel.⁵ While the obligations owed by applicants are similar under both Programs, the consequences are markedly different - immunity applicants may be eligible to be immunized from prosecution for offences under the Act whereas leniency applicants are expected to plead guilty to an offence under the Act and incur a penal sentence.

8. For the purposes of this Bulletin, the term "party" means a business organization or an individual, as the case may be. The terms "business organization" and "company" are used interchangeably. An "immunity applicant" means a party applying to the Bureau under the Immunity Program and a "leniency applicant" means a party applying to the Bureau under the Leniency Program.

ROLES OF THE COMMISSIONER, THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE COURTS

9. It is the responsibility of the Commissioner (and the Bureau) to investigate a matter that may engage the Act. Where there is evidence of an offence, the Commissioner may refer a matter to the DPP for consideration. In matters related to the exercise of the DPP's discretion, including a grant of immunity or leniency, the DPP (and the PPSC) is not bound by the Bureau's policies and procedures.
10. The Bureau's role is to make responsible and informed recommendations to the DPP. In accordance with the PPSC Deskbook⁶, the DPP will consult with the Bureau and give due consideration to its recommendations. However, the DPP retains its independent discretion to accept or reject the Bureau's recommendations.
11. Criminal prosecutions under the Act are the responsibility of the DPP. The DPP has the sole authority to grant immunity or leniency to a party implicated in an offence under the Act.⁷ The DPP's policy on the granting of immunity and leniency in matters related to the Act is articulated in the PPSC Deskbook.⁸
12. The respective roles and responsibilities of the Bureau and the PPSC are further described in the memorandum of understanding between the Commissioner and the DPP.⁹
13. Immunity agreements do not require judicial approval. However, under the Leniency Program, leniency applicants are required to enter a guilty plea in court. In this circumstance, the DPP and defence counsel typically make a joint sentencing submission. While the court has the sole authority to determine an appropriate sentence, judges understand that the DPP and the defendant are entitled to have a high degree of confidence that a joint

⁵ As described below, the Immunity Program applies to the offences under sections 45 to 49 (cartel offences) as well as offences found in sections 52 through 55.1 of the Act, whereas the Leniency Program is available only with respect to the cartel offences. Individuals and business organizations seeking further information on lenient treatment for matters related to deceptive marketing practices should contact the Deputy Commissioner, Deceptive Marketing Practices Directorate directly.

⁶ See chapter 5.2: *Competition Act* [Director's guideline issued under section 3(3)(c) of the *Director of Public Prosecutions Act*] (Part V): available online at <http://www.ppsc-sppc.gc.ca>.

⁷ The PPSC Deskbook guides the conduct of federal prosecutors and provides that the DPP should consult with the Bureau in the course of assessing the public interest. See section 3.4 of chapter 2.3 (Part II) and section 4.1 of chapter 5.2 (Part V) of the PPSC Deskbook.

⁸ *Supra* note 6. Crown counsel are also guided by Deskbook chapter 3.3 – Immunity Agreements.

⁹ Available on the Bureau's website at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/Protocole-entente-Memorandum-of-Understanding.pdf/\\$file/Protocole-entente-Memorandum-of-Understanding.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/Protocole-entente-Memorandum-of-Understanding.pdf/$file/Protocole-entente-Memorandum-of-Understanding.pdf).

sentencing submission will be accepted and will not be departed from unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.¹⁰ This is a high threshold and is intended to foster confidence that the joint sentencing submission will be respected by a sentencing judge.

PART ONE: THE IMMUNITY PROGRAM

OBTAINING IMMUNITY

14. A party implicated in domestic or international unlawful conduct that may violate the Act's criminal provisions¹¹ may offer to cooperate with the Bureau and request immunity. A company may, but does not have to, initiate an application on behalf of its employees. Employees may approach the Bureau on their own behalf.
15. In this Bulletin, the term "immunity" refers to a grant of immunity from prosecution under the Act. A party who does not qualify for immunity but cooperates with the Bureau's investigation may be eligible for a recommendation for lenient treatment in sentencing, as described in Part Two of this Bulletin.

Timing and required information

16. A party should come forward, in the manner described in paragraph 48, as soon as it believes it is implicated in an offence as the Bureau will grant an immunity marker, with respect to particular conduct, only to the first party to request immunity.
17. Timing is critical to the Bureau's enforcement interest and, in particular, to locating evidence as quickly as possible and coordinating investigatory steps with other jurisdictions if necessary. Consequently the program provides valuable incentives to encourage parties to apply for immunity as soon as possible.
18. The Act may be violated whether or not the applicant supplies products directly or indirectly in, from or into Canada. A party should seek immunity regardless of whether it supplies products directly or indirectly into Canada. Further, a party that does not sell products into Canada as part of a market allocation agreement, contrary to section 45 of the Act, or a party that agrees not to submit a bid in response to a call or request for bids or tenders contrary to section 47 of the Act may also seek immunity.¹²
19. Similarly, in the case of deceptive marketing practices, a party should request an immunity marker if it believes that it has, for example, engaged in deceptive telemarketing contrary to section 52.1 of the Act that targets consumers located outside Canada from call centres located in Canada.¹³
20. If an applicant later determines that it was not involved in an offence, it should notify the appropriate Deputy Commissioner and withdraw its immunity marker.

¹⁰ See, for example, *R. v. Anthony-Cook*, 2016 SCC 43.

¹¹ Immunity is not available for obstruction, for destruction of records or other things (collectively, records), or for any offence under the Act other than those identified in this Bulletin.

¹² Sections 45 to 49 of the Act are administered by the Deputy Commissioner, Cartels Directorate.

¹³ Sections 52 to 55.1 of the Act are administered by the Deputy Commissioner, Deceptive Marketing Practices Directorate.

-
21. It is not necessary for a party to have assembled a complete record of the information required when first contact is made with the Bureau. As the application process progresses, and before an immunity agreement is finalized, the Commissioner and the DPP will carefully examine an applicant's immunity request and subsequent cooperation to ensure that it complies with the Immunity Program's requirements.
 22. An applicant is required to provide complete, timely and ongoing cooperation, at its own expense, throughout the Bureau's investigation and any subsequent prosecution, including witnesses' travel to and from the Bureau or DPP offices.

Eligibility

23. Subject to the requirements set out below, and consistent with fair and impartial administration of the law, the Commissioner will recommend to the DPP that immunity be granted to a party in only the following circumstances:
 - a) the Bureau is unaware of an offence, and the applicant is the first to disclose all elements of the offence; or
 - b) the Bureau is aware of an offence, and the applicant is the first to come forward before the Bureau gathers sufficient evidence to warrant a referral of the matter to the DPP.
24. An applicant is required to stop participating in the illegal activity to qualify for immunity. When an offence is ongoing at the time that a request for immunity is made, an applicant, at the earliest opportunity, should raise with the Bureau any concerns it may have about what it can or cannot do to comply with this requirement and the possible impact that compliance or non-compliance could have on the Bureau's investigation.
25. The applicant must not have coerced others to be party to the illegal activity. An applicant will be ineligible where there is clear evidence of coercive behaviour, either express or implied. In particular, where there is evidence that the applicant pressured unwilling participants to be involved in the offence, the applicant will not be eligible for immunity.
26. Companies and individuals must demonstrate that they were a party to the offence in order to be eligible for immunity. A party to an offence is an individual or organization described in sections 21, 22 and 22.2 of the *Criminal Code*¹⁴.
27. A recommendation for immunity will only be made when the disclosed conduct constitutes an offence under the Act and is supported by credible and reliable evidence that demonstrates all elements of the offence.¹⁵
28. If an applicant provides insufficient information to demonstrate that it committed an offence, the Bureau will make no recommendation to the DPP as to a grant of immunity and will request that the applicant withdraw its immunity marker. In the event that the applicant does not withdraw its immunity marker, the immunity marker will be cancelled by the Deputy Commissioner following a minimum of 14 calendar days notice.
29. Where the applicant is the only party involved in the offence it will not be eligible for immunity. For example, the offence of false or misleading representations may be committed by one organization and be intended for the sole benefit of that organization. Individuals employed by an organization ineligible as a result of being the sole

¹⁴ R.S.C. 1985, c. C-46 (*Criminal Code*).

¹⁵ As described in step 3 of *The Immunity Process*, a grant of interim immunity will be recommended when the disclosed conduct demonstrates an offence under the Act and it appears that all other eligibility criteria are met.

participant may be separately eligible under the Immunity Program, as their admissions and evidence may further an investigation of the organization. Individuals are encouraged to apply for immunity through their own separate counsel.

30. Subsequent applicants who are party to the cartel offence may seek a leniency marker under the Bureau's Leniency Program, as described in Part Two.

Subsequent to the Immunity Application

31. Subject to paragraph 28, in cases in which it does not intend to further investigate, the Bureau will not make a formal recommendation for immunity to the DPP but rather will advise the applicant of the scope of the formal recommendation for immunity that it otherwise would have made to the DPP if the investigation had continued. This typically will be done verbally, unless the applicant requests or circumstances otherwise require that it be done in writing. When a matter does not proceed at the Bureau's discretion, the immunity marker will be put into abeyance, (i.e. defined and preserved by the scope identified by the Bureau). For example, where a marker request identified a national geographic market but the conduct only affected a specific regional market, the Bureau may preserve the marker on a regional market basis. Matters and conduct not included will not be preserved and will be considered anew should the applicant or another party subsequently seek an immunity marker.
32. If the Bureau subsequently decides that it will investigate the alleged unlawful conduct, it will advise the applicant and take steps to recommend that immunity be granted in accordance with the Immunity Program, provided that the organization and individual(s) that would be covered by the recommendation for immunity continue to meet its conditions.
33. The Bureau will not commence civil proceedings against an applicant in relation to the same or substantially the same facts that formed the basis of a grant of immunity in relation to the criminal provisions of the Act. The Bureau will treat the applicant in the same manner as if it had pleaded guilty to the offence for which it received immunity.

Cooperation Required

34. Throughout the course of the Bureau's investigation and subsequent prosecution, the applicant must provide complete, timely and ongoing cooperation. While the scope and content will vary with each case, at a minimum, cooperation includes the following:
- a) **Confidentiality.** Confidentiality helps to ensure that the integrity of the Bureau's investigation is maintained, that evidence is not destroyed, and that targets of the investigation do not become prematurely aware of investigative steps.

Unless made public by the Commissioner or the DPP, or as required by law in Canada or elsewhere, the applicant shall not disclose its application for an immunity marker, its cooperation and subsequent grant(s) of immunity, or any related information, to a third party.

Where disclosure is required by law or necessary to give effect to or further the application for immunity, the applicant must give notice to and consult with the Bureau and the DPP to reconcile where possible these disclosure obligations with the confidentiality requirements of the Immunity Program. The applicant shall give this notice as soon as it becomes aware of the disclosure requirement.

An applicant may disclose its application for an immunity marker and subsequent grant(s) of immunity, or any related information to:

- i) its counsel;
- ii) agencies in foreign jurisdictions to which the applicant has made similar applications for immunity or leniency; and,
- iii) with the prior consent of the Bureau, to any third party. Depending on the circumstances, the Bureau may require that the applicant obtain the consent of the DPP.

If an applicant or any of the individuals within the scope of the applicant's immunity application improperly disclose the application before obtaining consent or otherwise notifying the Bureau, they risk being found in breach of the cooperation requirement and may be ineligible to receive a grant of immunity.

- b) **Exhaustive Internal Investigation.** The requirements of the Immunity Program necessitate that an applicant reveal any and all conduct of which it is aware, or becomes aware, that may constitute an offence under the Act and in which it may have been involved.

Applicants will be expected to exercise reasonable due diligence in determining whether they have been involved in other criminal offences under the Act. Disclosure of the offences should be made as soon as possible after an immunity application and will be required before the Bureau recommends that the DPP sign an immunity agreement with the applicant.

- c) **Full, Complete and Truthful Disclosure.** The applicant must provide full, complete and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, that in any manner relate to the unlawful conduct for which immunity is sought. Further, absent compelling reasons, an applicant is expected to identify all of the other jurisdictions where it has made a similar application for immunity or leniency. Overall, there must be no misrepresentation of any material facts.

Non-privileged records to be disclosed in support of an immunity application include those responsive to the required information described in Appendix 2. The Immunity Program does not require applicants to waive applicable legal privileges that attach to records as a condition for obtaining immunity.

When an applicant chooses to withhold a record on the basis of legal privilege, the applicant must provide the Bureau with notice of the claim of privilege, the specific legal privilege being relied upon, and the nature of the record to which the privilege is purported to attach. The Bureau will provide this information to the DPP who may seek a determination of any privilege claim with the assistance of an independent counsel (IC) or a court of law. Additional explanation regarding this process can be found in paragraphs 98 to 100.

Offences uncovered after the signing of the immunity agreement must be brought to the attention of the Bureau and the DPP at the earliest possible time. The Immunity and Leniency Programs as well as Immunity Plus status may apply to the additionally disclosed conduct.¹⁶

An applicant, or any of the individuals within the scope of the applicant's immunity application, that provides false or misleading information to the Bureau in the context of an immunity application or during the performance of related obligations may be considered ineligible for immunity and face revocation of its Grant of Interim Immunity (GII)¹⁷. Such a person could also face a criminal charge of obstruction under section 64 of the Act, or of destroying or altering records under section 65 of the Act, or charges under the *Criminal Code*, including perjury or obstruction.

When an applicant becomes aware of instances of obstruction or destruction of records or other things arising in relation to activity for which immunity is sought, it should be brought to the attention of the Bureau as soon as possible. While each instance will be considered on a case-by-case basis, generally the approach taken by the Bureau and the DPP will result in the ineligibility for a recommendation or grant of immunity of individuals involved with obstruction or destruction of records. The applicant may be ineligible for a recommendation or grant of immunity when it was complicit in the misconduct or has prejudiced the Commissioner's investigation or subsequent prosecution.

- d) **Witness Cooperation.** Companies must take all lawful measures to secure the cooperation of current directors, officers and employees suspected of being involved in an offence for the duration of the investigation and any ensuing prosecution. Companies must also take all lawful measures to secure the cooperation of former directors, officers and employees as well as current and former agents suspected of being involved in the offence, where doing so will not jeopardize the investigation and where the company has the consent of the Bureau or the DPP, as set out in subparagraph 34(a). Companies shall encourage such persons to voluntarily provide to the Commissioner and the DPP all non-privileged information, evidence and records in their

¹⁶ For a description of Immunity Plus, see paragraphs 141 to 143.

¹⁷ For a description of the GI, see Step 3 at paragraphs 73 to 77 in Part One of this Bulletin.

possession or under their control, wherever located, that in any manner relate to the unlawful conduct. Companies must facilitate the ability of current and former directors, officers, employees and agents to attend interviews and to provide testimony in judicial proceedings in connection with the unlawful conduct.

- e) **Financial Commitment.** Parties must cooperate with the Bureau's investigation and any subsequent prosecution at their own expense, including, but not limited to, all costs related to document production, translation and travel.

IMPACT OF CORPORATE IMMUNITY ON DIRECTORS, OFFICERS, EMPLOYEES AND AGENTS

35. If a company qualifies for a recommendation for immunity, all current directors, officers and employees who admit their knowledge of or participation in an offence under the Act as part of the corporate admission, and who are willing to provide complete, timely and ongoing cooperation, also qualify for the same recommendation for immunity. Former directors, officers and employees who admit their knowledge of or participation in an offence under the Act and offer to co-operate with the Bureau's investigation may also qualify for a recommendation of immunity, however, the Bureau will make any such determination on a case-by-case basis.
36. Agents of a company that qualifies for a recommendation for immunity may be included in the same recommendation for immunity. The Bureau will make any such determination on a case-by-case basis. To qualify, an agent will, at a minimum, be required to admit their knowledge of or participation in the unlawful conduct and be willing to provide complete, timely and ongoing cooperation with the Bureau's investigation and any subsequent prosecution.
37. If a company does not qualify for a recommendation for immunity, current or former directors, officers, employees or agents may nonetheless be considered for immunity, as though they had approached the Bureau individually. To qualify, they will be required to admit their knowledge of or participation in the unlawful conduct and be willing to provide complete, timely and ongoing cooperation with the Bureau's investigation and any subsequent prosecution. The scope of the application will be considered on a case-by-case basis.

Obtaining the Cooperation of Directors, Officers, Employees and Agents

38. If an applicant requires the cooperation of a current director, officer, employee or agent and is concerned that approaching the person could alert other parties to the offence and affect the Bureau's investigation, it should contact the Bureau for guidance before approaching the person.
39. Before seeking the cooperation of an agent or a former director, officer or employee, the applicant must seek the consent of the Bureau.
40. Current and former directors, officers, employees and agents who intend on cooperating with the investigation must abide by the confidentiality obligations and the other requirements or risk being excluded from the Immunity Program.

THE IMMUNITY PROCESS

41. The immunity process is predicated upon ongoing obligations owed by the applicant to the Bureau and the DPP. An applicant is required to provide complete, timely and ongoing cooperation to the Bureau and the DPP, at its own expense, throughout the Bureau's investigation and any subsequent prosecution. When the requirements are satisfied, the applicant will be eligible for immunity from prosecution for the offence(s) disclosed.
42. The immunity application will follow a four step process: initial contact (marker request), proffer, GII (full disclosure and cooperation) and immunity agreement. While there may be some flexibility with the timelines associated with the immunity process, it is expected that the applicant will have 30 days from the date the marker was granted to complete its proffer and will have to complete its disclosure within six months of the DPP issuing the GII.
43. The Bureau is sensitive to the concerns of applicants about written proffers and other exchanges and, as a result, will permit a "paperless process".¹⁸

Step 1: Initial Contact (the Marker Request)

44. An "immunity marker" is the confirmation given to an applicant that it is the first party to approach the Bureau requesting a recommendation of immunity with respect to an offence under the Act. The immunity marker guarantees the applicant's place at the front of the line, subject to the applicant meeting all of the requirements of the Immunity Program.
45. A party may request an immunity marker for unlawful conduct subject to criminal sanction under Part VI of the Act. Offences described in sections 45 to 49 of the Act, including conspiracy (sections 45 and 46) and bid-rigging (section 47), are enforced by the Bureau's Cartels Directorate. False or misleading representations and deceptive marketing practices (sections 52 through 55.1) are enforced by the Bureau's Deceptive Marketing Practices Directorate.
46. In addition, an individual may request an immunity marker for such offences when liability arises from aiding or abetting any of these offences contrary to section 21 of the *Criminal Code* or counselling any of these offences contrary to section 22 of the *Criminal Code*.
47. Only one immunity marker will be granted for each offence, regardless of whether liability arises directly from the Act or through the application of section 21 or 22 of the *Criminal Code*.
48. It is recommended that an immunity marker request be made by telephone and that the applicant clearly states that it is making an immunity marker call. The applicant should ensure that all information is clearly received and that it and the Deputy Commissioner are in agreement that an immunity marker has been requested on the date and time of the request, and on the description of the relevant product or business interest.
49. An applicant can make the first contact on the basis of a limited hypothetical disclosure that identifies the nature of the unlawful conduct committed in respect of a specified product or business interest. At this stage of the process, the applicant's identity does not need to be disclosed.
50. Although an applicant can provide a limited disclosure during its first contact, the Bureau will require sufficient information to determine whether an applicant is first-in under the Immunity Program. It does this by comparing the

¹⁸ The paperless process only applies to communications between an applicant and the Bureau.

conduct and product or business interest description provided by the applicant to information already in the Bureau's possession. This enables the Bureau to determine whether another party previously requested an immunity marker for the same conduct, product or business interest.

51. For this reason, it is imperative that the applicant, when identifying the offence, provide a precise product or business interest definition, including a description of any sub-products that may be covered within the scope of the immunity marker request, as well as the time period for the conduct in question. In some circumstances, the Bureau may request more detailed information regarding the offence, the product or geographic market, the business interest, the relevant time period or the other parties involved to assist it in the determination of whether the requested immunity marker is available.
52. The Bureau generally will not consider joint requests by business organizations; only one party per offence will receive an immunity recommendation under the Immunity Program. The Bureau may make an exception in the case of a joint request from companies that are affiliated, as defined in subsection 2(2) of the Act.
53. While the request is typically made by an applicant's legal representative, anyone may initiate a request for immunity by communicating with the Deputy Commissioner, Cartels Directorate, or the Deputy Commissioner, Deceptive Marketing Practices Directorate, as the case may be, to discuss the possibility of receiving immunity from prosecution in connection with an offence under the Act.¹⁹ The DPP does not accept or grant immunity markers. An applicant cannot rely on any alternative contact at the Bureau or PPSC in respect of an application to obtain an immunity marker.
54. As soon as possible following the request, usually within a few days of receiving all requested information, the Deputy Commissioner will advise the applicant whether the requested immunity marker is available. If available, the Deputy Commissioner will also provide the name and contact information of the lead officer assigned carriage of the matter.
55. Upon issuance of the immunity marker the applicant is required to identify itself to the Deputy Commissioner or to the lead officer assigned carriage of the file in order to facilitate the Bureau's investigation.

Step 2: Proffer

56. Once an immunity marker is granted, the applicant has 30 calendar days to provide the Bureau with a detailed statement describing the unlawful conduct. This statement is known as a "proffer". A date to provide the proffer can be set by contacting the lead officer with carriage of the file. In general terms, the proffer must provide the Bureau with a sufficient understanding of the relevant conduct, the context in which it occurred and the evidence available to support the allegations.
57. Proffers are generally provided on a "without prejudice" basis by an applicant's counsel. Topics to be covered in a proffer include those set out in Appendix 2.

¹⁹ Typically, a Canadian lawyer represents the applicant in its dealings with the Bureau, although foreign counsel may be present at certain meetings. When in Canada, foreign counsel must ensure that they are acting in accordance with the requirements of the relevant law society or professional organization.

-
58. In the proffer, an applicant describes in detail the unlawful conduct demonstrating each element of the offence, the applicant's role in the offence for which immunity is sought and the connection of the unlawful conduct to Canada. The applicant must also outline all of the supporting evidence and witnesses that it is aware that it can provide at that point in time.
 59. While each case will need to be explained on its own terms, the Bureau will not under any circumstance accept a bare outline of the unlawful conduct or speculation as to the applicant's role. A comprehensive disclosure is required at this juncture.
 60. The Bureau will accept both oral and written proffers. In oral proffers, Bureau staff will take detailed notes of the information. Applicants should take special care to ensure that all information is clearly stated in a manner that allows sufficient time for note-taking. Accuracy is critical since the Bureau relies on the information to assess the immunity application, to develop its immunity recommendation and to pursue its investigation.
 61. The timing of a proffer can affect other steps in the Bureau's investigation, such as the execution of a search warrant or a coordinated enforcement action with another jurisdiction. In certain circumstances and at its sole discretion, the Bureau may require the applicant to make its proffer early within the 30 calendar day period, and also provide documentary evidence and access to witnesses before the proffer is completed. Any records provided or interview given to the Bureau at this stage will be treated as confidential or privileged under the assurance that information provided will not be used directly against the applicant for investigative purposes.²⁰ The Bureau will not return records to the applicant.
 62. The applicant should alert the Bureau to any impediments to complying with the Bureau's required schedule as early in the process as possible to avoid prejudice to the Bureau's investigation. If an applicant cannot complete its proffer within 30 calendar days after an immunity marker has been granted then it should seek an extension from the Deputy Commissioner or risk having its immunity marker cancelled. Upon a request to the Deputy Commissioner to extend the proffer period beyond 30 calendar days, the applicant should provide the reasons for the delay, information on the status of its internal investigation, a detailed proposed work plan for completing its proffer, and an update on the status of its cooperation with other agencies.
 63. The Deputy Commissioner will decide whether any delay in cooperation is reasonable. A delay may be warranted in complex cases. However, the Bureau will not accept delays solely because an applicant has commitments arising out of other jurisdictions or because the applicant's counsel is unavailable. Upon request, the applicant must advise the Bureau, in a manner that does not waive any legal privilege, of the progress of its internal investigation.
 64. In certain circumstances, the Deputy Commissioner may request an undertaking from the applicant to provide the information by a specified date, together with an acknowledgement that its immunity marker will automatically lapse if the undertaking is not fulfilled. In the absence of an extension to complete the proffer, delays may result in the automatic lapsing of the applicant's immunity marker.
 65. There is no obligation on the Deputy Commissioner to notify the applicant that its immunity marker has lapsed. Rather, it is the applicant's responsibility to seek an extension from the Deputy Commissioner.

²⁰ See Part 4.3 in Chapter 3.3 ("Use Immunity" investigative assistance agreements) of the PPSC Deskbook.

-
66. The Deputy Commissioner may also cancel an immunity marker if the applicant fails to meet any of the other requirements of the Immunity Program. Under these circumstances, cancellation of an immunity marker will be made only after a minimum of 14 calendar days notice to the applicant.
 67. Applicants have a positive obligation to update their proffered information as they become aware of either new or corrected information. This must be done promptly and on an ongoing basis, regardless of whether the Bureau has specifically asked for the information. Further, applicants must provide timely responses to any questions posed or information requests made by the Bureau.
 68. The Bureau considers a proffer to be complete when it has received sufficient information to make a comprehensive recommendation to the DPP that it issue a GII for all conduct contemplated under the immunity marker. Applicants should contact the Deputy Commissioner directly to modify the scope of the immunity marker, if necessary.
 69. If the Bureau concludes that the applicant demonstrates its capacity to provide full cooperation and fully satisfy the requirements for obtaining immunity, it will present all relevant proffered information, together with a recommendation regarding the applicant's eligibility under the Immunity Program, to the DPP.
 70. A GII can be granted to a business organization or an individual. When a GII is to be granted to an organization, individuals who have knowledge of or were involved in the conduct and who are willing to cooperate with the terms and conditions of the Immunity Program may be eligible for coverage under the GII.
 71. Where the applicant is a recidivist then the DPP may assess whether granting immunity to the applicant is in the public interest before issuing the GII.²¹
 72. While the DPP will give the Bureau's recommendation due consideration, the DPP has final (independent) authority to decide whether it will enter into a GII. While in the normal course the DPP will be able to make a decision on a GII based on proffered information, there may be circumstances in which the DPP requests to see records or that a witness or witnesses be interviewed in order to confirm that there is a sufficient basis to grant a GII.

Step 3: Grant of Interim Immunity: Full Disclosure and Cooperation

73. On the basis of the conduct described in the Bureau's recommendation, which is based on the proffered information, it is anticipated that the DPP will issue a GII to the applicant. The purpose of the GII is to facilitate the Bureau's investigation by formalizing the legal framework within which an applicant will disclose records and make witnesses available.
74. The GII is a conditional immunity agreement that sets out the applicant's ongoing obligations that must be fulfilled in order for the DPP to finalize the immunity agreement. The GII states who is covered by the agreement, how information provided by the immunity recipient will be treated and under what circumstances the agreement can be revoked.
75. The applicant's obligations under the GII are to provide complete, timely and ongoing cooperation as well as full,

²¹ In its consideration of recidivism and the public interest the DPP ordinarily will only consider previous offences under the Act that occurred or were judicially sanctioned within 10 years of the present application for Immunity. More generally, the DPP will consider the proximity of the previous offence(s) and the proximity of entities (including affiliation) previously convicted to the present applicant and the conduct for which it seeks immunity. Further, an application for leniency in sentencing will not be considered recidivism when attached to an Immunity Plus request. However, prior grants of immunity or leniency may be considered as such in subsequent applications under the Programs.

complete, and truthful disclosure throughout the Bureau's investigation and any subsequent prosecution.

76. Both the applicant and the DPP must sign the GII. The Commissioner also signs the agreement for the purpose of giving effect to the Commissioner's rights and obligations as set out in the agreement. Sample corporate and individual template letters and agreements are included in Appendix 3.
77. The full disclosure process will be conducted on the understanding that neither the Bureau nor the DPP will use the information against the applicant or the individuals included in the application, unless there is a breach of the terms and conditions of the GII.

The Nature of the GII

78. If not disclosed in the course of the proffer process, the applicant will provide the Bureau, on a "without prejudice" basis, the names and titles of the individuals and affiliates it wishes to include in the GII. Relevant individuals and affiliates may be added or removed, as necessary. Counsel should confirm that each identified affiliate was implicated in the conduct and that each individual is prepared to admit his or her knowledge of or participation in the unlawful conduct and their willingness to cooperate in a complete, timely and ongoing manner.
79. All identified current directors, officers or employees, will be included under the GII unless they fail to admit their knowledge of or participation in the unlawful conduct or they fail to cooperate in a complete, timely and ongoing manner. Identified agents or former directors, officers or employees may be considered for inclusion on a case by case basis.
80. The Bureau will recommend to the DPP that it remove from the GII those individuals who cannot or will not admit their knowledge of or participation in the unlawful conduct as well as those individuals who have otherwise demonstrated an unwillingness to cooperate in a complete, timely and ongoing manner.
81. When an individual is to provide evidence pursuant to a business organization's GII, he or she will be provided with a letter from the DPP that confirms that the individual is covered under the business organization's GII.
82. Sample corporate and individual template letters and agreements are included in Appendix 3.

Disclosure

83. After an applicant enters into a GII with the Commissioner and the DPP, the applicant must complete the full disclosure process. The full disclosure process can be expensive and time-consuming. The applicant must be prepared to dedicate the resources necessary to support an expeditious and thorough investigation.
84. The Bureau requires full, complete, and truthful disclosure of all non-privileged relevant information, including records responsive to the information checklist described in Appendix 2, in the applicant's possession, under its control or available to it, wherever located, that, in any manner, relate to the unlawful conduct.
85. Accuracy of the information provided is critical to the Bureau. The Bureau relies on this information to pursue its investigation of other participants to the alleged offence. An applicant that provides false or misleading information to the Bureau or fails to fully cooperate in accordance with its obligations may face revocation of its GII. As provided above, the applicant may also face criminal charges under the Act or the *Criminal Code*.

-
86. At this stage, the topics addressed by an applicant will generally be the same as those addressed at the proffer stage, but will be covered in greater detail and further supported by records and testimonial evidence.
 87. A schedule for disclosure should be established early in the immunity process and production of records completed within the disclosure period, normally within six months. Unwarranted delays or failure to provide access to witnesses arising from other commitments, including any that arise from immunity or leniency applications in other jurisdictions, may be considered to be a breach of the GII.
 88. Applicants are expected to take all lawful measures to secure the cooperation of current directors, officers and employees, as well as any agents or former directors, officers or employees covered by the GII, and to facilitate their ability to appear for interviews and provide testimony in prosecutions at the applicant's expense.
 89. If a witness refuses to provide complete, timely and ongoing cooperation with the investigation and any subsequent prosecution, the Bureau may make a recommendation to the DPP that the witness be excluded from the GII and face prosecution. Typically, the Bureau will discuss the situation with the witness and provide the witness with a reasonable opportunity to cooperate with the Bureau's investigation and any subsequent prosecution before making such a recommendation to the DPP. The DPP may, as a result of the Bureau's recommendation, or on its own initiative, exclude the witness from the GII.
 90. An applicant will identify material witnesses and describe each witness's knowledge of the relevant conduct and/or the connection of the relevant conduct to the Canadian marketplace as soon as practicable. Bureau officers ordinarily will request to interview key witnesses as soon as possible.
 91. An applicant should anticipate that witnesses will be asked about any criminal activity, under any legislation, that can reasonably be expected to impact their credibility as a witness. This will include any individual's previous convictions, pending charges and awareness of being the target of a criminal investigation. Such disclosure may relate to criminal activity in Canada or abroad. Before offering immunity, it is essential that the DPP be satisfied that the applicant disclosed all information likely to affect its credibility.
 92. Witness interviews may be audio or video recorded and may be taken under oath. In the course of the investigation, the Bureau may require that a witness be interviewed more than once. It is expected that sworn audio-video recorded interviews will be taken at an advanced stage of the investigation in order to support recommendations to the DPP.²²
 93. If applicable, a witness's statement may be used to impeach or cross-examine the witness if their court testimony is materially inconsistent with the statement previously provided to the Bureau.
 94. Records likely relevant to a witness interview should be provided to the Bureau by the applicant at least two weeks before an interview. Upon submission, the applicant is expected to explain the relevance and significance of the records in relation to the witness interview. Delay in submitting relevant records or providing voluminous amounts of records with insufficient lead time could result in the rescheduling of the witness interview or, in certain circumstances, constitute a breach of the applicant's cooperation obligations.

²² Consistent with Part Three, the Bureau will take all reasonable measures to preserve the confidentiality of the recording.

-
95. With respect to the disclosure of records, an applicant should consult with the lead officer assigned to the matter in order to discuss the relevance and scope of records to be produced and the form in which they will be provided. The Bureau does not need or want records that are not relevant to the offence—"record dumps" are not acceptable. An applicant is required to discuss its record production with the Bureau on an ongoing basis and to raise any concerns or challenges early in the process.
 96. The Bureau typically requires that records be produced in electronic format. Applicants must consult the Bureau's Guidelines on the *Production of Electronically Stored Information* and discuss the general technical requirements with the lead officer assigned to the file. In many instances, it will be necessary to arrange for direct contact between the technical experts for each side to discuss any issues associated with the transfer or receipt of records.
 97. When requested by the Bureau or the DPP, the applicant is expected to produce certified translated records and to arrange for a certified interpreter to accompany its witnesses. Neither the Bureau nor the DPP will bear the cost of interpretation with respect to oral evidence or translation with respect to records not provided in one of Canada's official languages.
 98. Within 30 days of the GII being issued, claims of privilege over records otherwise described in paragraph 84 must be disclosed to the Bureau along with the specific legal privilege being claimed and the nature of the records over which the privilege is being claimed.²³ The Bureau will refer this information to the DPP. If the DPP is not persuaded of the privilege claim's sustainability²⁴ the privilege claim may be reviewed.
 99. Where the parties are in agreement, an IC may be used to resolve a disagreement regarding a privilege claim. Where use of an IC is not available or considered appropriate, the assistance of a court may be sought to resolve a claim of privilege including through the relevant provisions of the Act or the *Criminal Code*.
 100. The Bureau expects applicants to deal with claims of privilege in good faith and expeditiously.
 101. The GII requires, when requested by the DPP, the applicant's witnesses to testify under oath or solemn affirmation in proceedings commenced by the DPP in connection with the relevant conduct.
 102. Non-compliance with the terms and conditions of the GII will provide the DPP with grounds to revoke the GII. Under these circumstances, the applicant will generally be given 14 days notice in order to provide it with the opportunity to make itself compliant. Further information regarding failures to comply with the GII can be found in paragraphs 106 to 108.

Step 4: Final Grant of Immunity

103. The Bureau will make its recommendation to the DPP once the applicant has satisfied its obligations under the GII. If after review, the DPP accepts the recommendation, the DPP will finalize the grant of immunity.

²³ While no waiver of privilege is involved in the provision of this information, the description of the record must enable the DPP to understand the nature of the information over which privilege is claimed and the basis upon which the privilege claim is founded.

²⁴ It is not the DPP's responsibility to determine the legality of any claim of privilege. Claims of privilege will be determined in accordance with the laws of Canada.

-
104. All individuals identified in the GII who upheld the requirements of the Program and were otherwise determined to be eligible for immunity, and all affiliates demonstrated to be implicated in the unlawful conduct will be included in the final grant of immunity.
 105. The final grant of immunity will be communicated by way of a confirmation letter from the DPP identifying, among other things, the individuals and affiliates covered by it. While each case will be weighed on its own merits, the DPP ordinarily will not finalize the GII prior to: 1) the lapse of the statutory period to file a notice of appeal, when no party seeks to appeal the trial court decision in the event of a criminal prosecution; or 2) when the Commissioner and DPP have no reason to believe that further assistance from the applicant could be necessary.

FAILURE TO COMPLY WITH THE OBLIGATIONS OF THE GRANT OF INTERIM IMMUNITY

106. Where the Bureau becomes aware that an applicant has not met the terms and conditions set out in the GII, the Bureau may make a recommendation to the DPP to revoke the GII, if warranted. Typically, the Bureau will discuss the situation with the applicant and provide an opportunity for the applicant to address any shortfalls in its cooperation as quickly as possible before making a recommendation for revocation to the DPP.
107. As a result of the Bureau's recommendation, or on its own initiative, the DPP may revoke a GII where the applicant does not meet all of the terms and conditions of the GII, and take further action against the applicant as appropriate in the circumstances. Where the DPP determines that the applicant has failed to fulfil the terms and conditions set out in the GII, the DPP will provide a minimum of 14 calendar days notice to the applicant so that it has an opportunity to remedy its failure before revoking the GII. The DPP's policy on immunity, including the approach it will take when an agreement is breached, is set out in chapters 3.3 and 5.2 of the PPSC Deskbook.²⁵
108. Revocation of a GII and other responses to non-compliance will affect only the individual or organization that is not cooperating or that otherwise fails to comply with the GII. An organization's coverage under a GII can be revoked while its cooperating directors, officers, employees or agents who are covered under the GII retain their protection. Likewise, it is possible for an individual's coverage under a GII to be revoked while the organization remains covered.

PART TWO: THE LENIENCY PROGRAM

OBTAINING LENIENCY²⁶

109. The Leniency Program is intended to provide a predictable and transparent manner to resolve liability for parties who offended the Act's cartel provisions, found in sections 45 to 49, including conspiracy and bid rigging, when an

²⁵ For further information, see: <http://www.ppsc-sppc.gc.ca>.

²⁶ As identified below, many of the principles that apply to the Immunity Program also apply to the Leniency Program and the reader is pointed to the relevant portions. Where identified, those principles apply to the Leniency Program *mutatis mutandis*, that is, subject to necessary contextual considerations. To the extent of any inconsistency, the information found in Part Two applies to the Leniency Program.

immunity marker is not available.²⁷

- 110. As previously provided, a party may contravene the Act even if it does not supply products, directly or indirectly, into Canada (for example, market allocation and cover bidding schemes).
- 111. A party may also apply to the Leniency Program on the basis of liability that arises from sections 21, 22 or 22.2 of the *Criminal Code*.
- 112. A party implicated in domestic or international cartel activity may offer to cooperate with the Bureau in exchange for lenient treatment in sentencing. A collaborative approach to resolving liability under the Leniency Program provides parties with greater certainty and furthers the Bureau's investigation by facilitating the collection of evidence in a cost-effective manner.

Timing

- 113. The timeliness of a leniency application is important. When the Bureau has referred the results of its investigation to the DPP for the purposes of a prosecution, the Leniency Program will no longer be available to an individual or business organization.
- 114. Further, the timing of a leniency applicant's cooperation will affect its value to the Bureau. Ordinarily, the credit to be recommended by the Bureau for the applicant's cooperation will be higher for early disclosure.
- 115. Individuals and organizations are encouraged to come forward and request a leniency marker as soon as they believe they may be implicated in an offence. It is not necessary for a party to have assembled a complete record of the information required when contact is first made with the Bureau.
- 116. If a leniency applicant later determines it was not involved in an offence, it should notify the Deputy Commissioner and withdraw its leniency marker²⁸.

Eligibility

- 117. Subject to the requirements set out below, and consistent with fair and impartial administration of the law, the Commissioner will recommend to the DPP that leniency in sentencing be granted to a party in only the following circumstances:

- a) it has terminated its participation in the cartel;²⁹

²⁷ Individuals and business organizations seeking further information on lenient treatment for matters related to deceptive marketing practices should contact the Deputy Commissioner, Deceptive Marketing Practices Directorate. The Leniency Program is not available for obstruction, destruction of records or any offence under the Act other than those identified in this paragraph.

²⁸ A "leniency marker" is an acknowledgment given to a leniency applicant that records the date and time of the application. It establishes the leniency applicant's position in line in relation to other individuals or organizations seeking to participate in the Leniency Program, which also may be considered in the determination of the credit to be recommended for the leniency applicant's cooperation.

²⁹ If there is a risk that stopping its conduct will alert the other participants to the Bureau's investigation, leniency applicants should raise with the Bureau any concerns they have about what they can or cannot do to comply with this requirement and the possible impact that non-compliance could have on the Bureau's investigation at the earliest opportunity.

-
- b) it agrees to cooperate fully and in a timely manner, at its own expense, with the Bureau's investigation and any subsequent prosecution of the other cartel participants by the DPP; and,
 - c) it demonstrates that it was a party to the offence;³⁰ and,
 - d) it agrees to plead guilty.
118. A recommendation for leniency will only be made when the disclosed conduct constitutes an offence under the Act and is supported by credible and reliable evidence³¹ that demonstrates all elements of the offence.

Subsequent to the Leniency Application

119. The principles found in paragraphs 31 to 33 of the Immunity Program apply equally in the context of the Leniency Program. Please refer to Part One of this document.

Cooperation Required

120. The principles found in paragraph 34 of the Immunity Program apply equally in the context of the Leniency Program. Please refer to Part One of this document.
121. If a leniency applicant or any of the individuals within the scope of the leniency applicant's application engage in obstruction after requesting leniency, they risk expulsion from the Leniency Program and prosecution for both obstruction and the offence for which leniency was sought. Whether the applicant or any individuals will be expelled from the Leniency Program will be determined on a case-by-case basis having regard to all of the circumstances in question.
122. Leniency applicants are expected to act in good faith with regards to their participation in the Leniency Program, and their intention to plead guilty and resolve their legal liability. If a leniency applicant believes that it may have a potential legal defence in respect of its conduct that it intends to raise, it should decide as soon as possible, prior to the leniency recommendation (Step 3 of the Leniency Process), whether it intends to plead guilty to an offence and pursue its leniency application. The Bureau does not expect that leniency applicants will complete the proffer and disclosure processes only to raise potential legal defences after a leniency recommendation has been made by the Bureau to the DPP, such that the requirement to plead guilty is rendered ineffective for all of the proffered conduct.

LENIENCY IN SENTENCING: DETERMINING THE RECOMMENDED FINE

123. For business organizations the Bureau's recommended fine to the DPP³² is informed by numerous variables, including: an estimated base fine determined by the relevant volume of commerce and an estimation of economic harm; aggravating and mitigating factors, including any credit to be given for the existence of an effective corporate compliance program; and the value of the leniency applicant's cooperation to the Bureau's

³⁰ A party to an offence is an individual or organization described in sections 21, 22 and 22.2 of the *Criminal Code*.

³¹ The Bureau will consider all evidence in its possession when making its assessment.

³² The DPP has independent discretion to accept or reject the Bureau's fine recommendation. The court will give the Crown's submissions on a recommended fine due consideration but the judge hearing the matter has the ultimate authority to determine the appropriate penalty.

investigation.³³ Generally, the Bureau's recommendation adopts the following framework:

$$\text{Recommended fine} = \text{Base fine} +/ - (\text{net effect of aggravating and mitigating factors}) - \text{leniency cooperation credit}$$

The following paragraphs describe the elements considered in the course of developing a fine recommendation.

The Base Fine

124. To establish the base fine the Bureau first determines the relevant volume of commerce affected by the cartel behaviour. Then the Bureau estimates overcharge from the cartel activity that resulted from the conduct by using a proxy or readily accessible compelling evidence demonstrative of a more appropriate measure of the overcharge.
125. For the purpose of determining the relevant volume of commerce, the Bureau may include an Applicant's indirect sales³⁴ into Canada. Such sales will be limited to the volume of commerce related to the value of the relevant input into the end product sold into Canada.
126. Where cartel members are penalized in another jurisdiction for the direct sales that led to the indirect sales into Canada, the Bureau may consider, on a case-by-case basis, whether the penalties imposed or likely to be imposed in the foreign jurisdiction are adequate to address the economic harm in Canada resulting from the indirect sales. Information regarding the supply chain will be particularly important in cases involving indirect sales.
127. In the absence of readily accessible compelling evidence demonstrative of a more appropriate measure of the overcharge, the Bureau uses a 20 percent proxy comprised of two components to determine the base fine:
 - i) 10 percent of the affected volume of commerce in Canada as a proxy for the overcharge from the cartel activity; and
 - ii) 10 percent of the affected volume of commerce in Canada for deterrence and to ensure that the fine is sufficiently large so that it does not represent a mere licensing fee or a cost of doing business.
128. In instances where 10 percent of a leniency applicant's affected volume of commerce is greater than the statutory maximum, the base fine will be the statutory maximum.
129. The 10 percent proxy used to estimate the overcharge from cartel activity is used when the leniency applicant does not provide or the Bureau cannot calculate, on the basis of compelling evidence, the actual overcharge imposed by the cartel.
130. Where the evidence is readily accessible, compelling and does not require modelling by the Bureau, the Bureau will consider submissions provided by leniency applicants on a timely basis that demonstrate a lower overcharge.

³³ An additional credit may be available, for example, in the context of Immunity Plus, discussed at paragraphs 141 to 143, below.

³⁴ Indirect sales into Canada occur when a cartelized product is used as an input into an intermediate or final product manufactured abroad that is subsequently sold to a purchaser in Canada. Where the Applicant or the Bureau has evidence of indirect sales into Canada, the Bureau expects or may request, as applicable, that an Applicant provide information in its possession to assess the Applicant's potential liability for such sales. The Bureau will, where necessary, work with the Applicant to develop a feasible methodology to estimate the affected volume of commerce associated with its indirect sales into Canada.

Delays arising from the leniency applicant's determination of the overcharge will not be accepted.

131. Where the Bureau has compelling evidence which indicates that a higher overcharge is appropriate, it may use such information to determine the recommended fine. The leniency applicant will be advised of the evidence indicating a higher overcharge and will be provided with an opportunity to respond in a timely manner.
132. In any event, the determination of the overcharge will be expressed as a percentage of the affected volume of commerce.
133. Once the overcharge is determined, an additional 10% of the affected volume of commerce in Canada, representing the deterrence proxy, will be added to that amount.
134. In instances where a leniency applicant has no affected commerce attributable to sales in Canada (for example due to a market allocation or cover bidding scheme), the relevant proxy will not take into account any overcharge and the affected volume of commerce will be estimated on the basis of the volume of commerce of the co-cartelist who sold in, from or into Canada. Where such data is unavailable, the Bureau will estimate, on the basis of direct or circumstantial evidence, the volume of commerce on the basis of the volumes contemplated at the time the conspiracy or bid-rigging agreement was entered into.
135. Once the relevant volume of commerce is identified and the base fine determined, the Bureau will apply:
 - i) the net effect, if any, of aggravating and mitigating factors onto the base fine; and subsequently,
 - ii) the leniency cooperation credit, and
 - iii) the Immunity Plus credit, if applicable.

Aggravating and Mitigating Factors

136. Aggravating and mitigating factors apply to both individuals and business organizations. For more information on aggravating and mitigating factors, and how they factor into sentencing recommendations, see Part XXIII of the *Criminal Code* and relevant sentencing case law.
137. The net effect of the aggravating and mitigating factors will be estimated as a percentage of the base fine.

Credit for Credible and Effective Corporate Compliance Programs

138. Where the Bureau is satisfied that a compliance program *in place at the time the offence occurred* was credible and effective, consistent with the approach set out in the Bureau's *Bulletin on Corporate Compliance Programs*, the Bureau will treat the compliance program as a mitigating factor when making its recommendation to the DPP.

The Leniency Cooperation Credit (the LCC)

139. Every leniency applicant will be eligible for a leniency cooperation credit of up to 50%. The amount of credit to be assigned will be based on the value of the leniency applicant's cooperation to the Bureau's investigation.
140. The LCC will be determined having regard to the extent that the cooperation added to the Bureau's ability to advance its investigation to pursue other culpable parties. This will take into account a number of factors. The

timing of the leniency application (relative to other parties in the cartel, as well as relative to the stage of the Bureau's investigation) is an important factor related to cooperation. Other relevant factors include the timeliness of disclosure; the availability, credibility and reliability of witnesses; the relevance and materiality of the applicant's records; and any other factor relevant to the development of the Bureau's investigation into the matter or any additional matter for which the party is eligible for "Immunity Plus".

Immunity Plus, Evidence of a Broader Conspiracy and Other Considerations

141. If a leniency applicant discloses evidence of conduct constituting a further criminal offence under the Act unknown to the Bureau, the leniency applicant may be eligible for Immunity Plus status. If the leniency applicant meets the requirements set out in the Immunity Program regarding the newly-disclosed offence, the Bureau will recommend that the DPP grant the applicant immunity from prosecution with respect to the newly-disclosed offence. In addition, for second-in and later leniency applicants, the Bureau will recommend that any individuals qualifying under the Leniency Program be afforded further lenient treatment in respect of the offence for which leniency is being sought. In recognition of the leniency applicant's full cooperation in reporting the further offence, the Bureau will typically recommend that an additional five to 10 percent be added to the applicant's leniency credit.
142. The size of the recommended Immunity Plus credit will depend on a number of factors relating to the conduct for which immunity is available, including the strength of the evidence provided by the applicant and the estimated significance of the case brought forward by the applicant, measured in such terms as the affected volume of commerce in Canada, the geographic scope of the conduct in question, and the number of co-conspirator organizations and individuals involved in the conduct in question. This credit will be applied only where all conditions of cooperation under the Immunity Program and Leniency Program are met by the applicant.
143. If a leniency applicant's cooperation reveals that the scope of the initial cartel offence for which leniency is being sought is broader (e.g., in terms of the duration of the offence) than previously identified by or known from the Bureau's investigation or from other cooperating parties, the Bureau will not use that information against the applicant when determining a leniency recommendation.
144. Other relevant considerations may affect the Bureau's leniency recommendation, depending on the circumstances.

IMPACT OF LENIENCY ON DIRECTORS, OFFICERS, EMPLOYEES AND AGENTS³⁵

145. At the request of the first-in leniency applicant that is a business organization, the Bureau will recommend that no separate charges be laid against the Leniency applicant's current directors, officers or employees, and that they be included in the plea agreement³⁶ provided that such individuals admit knowledge of or participation in the unlawful conduct and are prepared to cooperate, in a timely fashion, with the Bureau's investigation in a complete and ongoing manner. Agents and former directors, officers and employees implicated in the offence may qualify for leniency provided that they admit knowledge of or participation in the unlawful conduct and are prepared to cooperate with the Bureau's investigation and any subsequent prosecution.

³⁵ Leniency applicants implicated in an investigation that is not in the public domain must approach individuals in the manner described in paragraphs 38 to 40 of the Immunity Program.

³⁶ A plea agreement is a private (non-public) agreement between the DPP and leniency applicant. Among other things, it identifies the unlawful conduct, the business organizations and individuals covered by the agreement and the anticipated terms of a plea to be entered into a court.

146. Individuals to be considered for leniency must be identified by the leniency applicant. The leniency applicant will provide the Bureau, on a "without prejudice" basis, the names and titles of the individuals it wishes to include in the plea agreement. Relevant individuals may be added or removed, as necessary, up to the applicant's plea being entered into court. Counsel should confirm that each individual is prepared to admit his or her knowledge or participation in the unlawful conduct and their willingness to cooperate in a complete, timely and ongoing manner.
147. No identified current director, officer or employee will be excluded from coverage under the plea agreement for any reason other than a failure to admit his or her knowledge of or participation in the unlawful conduct or a failure to cooperate in a complete, timely and ongoing manner.
148. A determination regarding agents and former directors, officers, and employees will be made on a case-by-case basis. For example the value of the information they can provide or whether they are currently employed by another party to the offence may be considered.
149. The inclusion of an individual in the plea agreement is conditional upon the individual upholding the terms of the plea agreement and the requirements of the Leniency Program. Failure to uphold these requirements may result in the individual losing his or her coverage. The Bureau will recommend to the DPP that it remove from the plea agreement those individuals who cannot or will not admit their knowledge of or participation in the unlawful conduct as well as those individuals who have demonstrated an unwillingness to cooperate in a complete, timely and ongoing manner.
150. When an individual is to provide evidence pursuant to a business organization's plea agreement, they will be provided with a letter from the DPP that confirms that the individual is covered under the business organization's plea agreement.
151. Where the first leniency applicant is an individual applying independently (i.e., implicating his or her current or former employer), leniency will be accorded in the same manner as if the individual were covered by an employer's leniency application. This approach is conditional upon an individual meeting the eligibility requirements of the Leniency Program and providing complete, timely and ongoing cooperation.
152. For the second and any subsequent leniency applicant, current and former directors, officers, employees and agents may be charged depending on their role in the offence. When making its recommendation to the DPP as to whether a director, officer, employee or agent should be charged, and any applicable fine or custodial sentence, the Bureau will consider all of the available facts and circumstances in respect of such an individual's participation in the offence.
153. The Bureau takes into account a number of considerations when developing sentencing recommendations for individuals. These include the role and extent of involvement of the individual in the offence, the degree to which the individual personally benefited from the offence (e.g., through advancement, salary increases, performance bonuses, etc.), and whether the individual has been previously sanctioned for offences in Canada or another jurisdiction.

THE LENIENCY PROCESS

154. The leniency process is predicated upon ongoing obligations owed by the leniency applicant to the Bureau and DPP. A leniency applicant is required to provide complete, timely and ongoing cooperation to the Bureau and DPP, at its own expense, throughout the Bureau's investigation and any subsequent prosecution. When the requirements are satisfied, the applicant will be eligible for lenient treatment in sentencing for the offence(s) disclosed at the discretion of the DPP.³⁷
155. The leniency application will follow a seven step process: initial contact (marker request), proffer and limited disclosure, leniency recommendation, plea agreement, full disclosure, court proceedings and ongoing cooperation. The applicant will have 30 days from the date the marker was granted to complete its proffer and is expected to complete its limited disclosure within 60 days from the completion of its proffer. Following the plea agreement, the leniency applicant will be expected to complete its full disclosure within six months. Applicants who fail to advance their matters in a timely manner may be expelled from the Leniency Program.

Step 1: Initial Contact (the Marker Request)

156. A "leniency marker" is the acknowledgement given to a leniency applicant that records the date and time of a leniency applicant's application to the Leniency Program. It establishes the leniency applicant's position in line in relation to other individuals or organizations seeking to participate in the Leniency Program. The leniency marker guarantees the leniency applicant's position in line, subject to the leniency applicant meeting all of the criteria of the Leniency Program.
157. Marker requests made in the course of a leniency application generally follow the same principles and requirements described in paragraphs 56 through 67 of the Immunity Program (see Part One). To the extent of any inconsistency, the information found in Part Two applies to the Leniency Program.
158. Leniency markers are granted by the Deputy Commissioner, Cartels Directorate. Leniency applicants cannot rely on any alternative contact, for example, with a Bureau officer or other Bureau employee, in respect of its application to obtain a leniency marker. Further, the DPP does not accept leniency marker calls or grant leniency markers.
159. An individual or an organization can request a leniency marker. Typically, a leniency applicant's counsel makes the contact with the Bureau. It is recommended that leniency marker requests be made by telephone and that the leniency applicant clearly state that it is making a leniency marker call. The leniency applicant should ensure that all information is clearly stated and that it and the Deputy Commissioner, are in agreement that a leniency marker has been requested, on the date and time of the request, and on the description of the relevant product. As soon as possible following the request, usually within a few days, the Deputy Commissioner, will advise the leniency applicant whether the requested leniency marker is available and its position in line.

³⁷ The DPP has independent discretion to accept or reject the Bureau's leniency recommendation. However, the PPSC Deskbook provides that the PPSC should consult with the Bureau and give due consideration to its recommendation.

-
160. A leniency applicant that receives a leniency marker will be allowed four business days to confirm its intention to participate in the Leniency Program. Once participation is confirmed, the leniency applicant has 30 calendar days to provide a proffer. That is, a detailed statement describing the unlawful conduct, its effects in Canada and the supporting evidence, as described below in Step 2 of the Leniency Process.
 161. Upon issuance of the leniency marker, the applicant is required to identify itself to the Deputy Commissioner or to the lead officer assigned carriage of the file in order to facilitate the Bureau's investigation.

Step 2: Proffer and Limited Disclosure

162. Proffers made in the course of a leniency application generally follow the same principles and requirements described in paragraphs 56 through 67 of the Immunity Program (see Part One) and Appendix 2. To the extent of any inconsistency, the information found in Part Two applies to the Leniency Program.
163. The proffer will describe in detail the unlawful conduct, the leniency applicant's role in the offence(s) for which leniency is being sought and the effect of the unlawful conduct in Canada. The leniency applicant must also outline all of the supporting evidence and witnesses that it is aware of at that juncture.
164. The Deputy Commissioner will discuss timing requirements with the leniency applicant during the leniency marker call. The timing of a proffer can affect other steps in the Bureau's investigation, such as the execution of a search warrant or cooperation with another jurisdiction, where timing can be critical. In certain circumstances the Bureau may require the leniency applicant to make its proffer early within the 30 calendar day period.
165. In preparing the proffer, leniency applicants are expected to conduct thorough internal investigations to locate all relevant evidence, wherever located, whether in Canada or elsewhere. Evidence may be in the form of records, witness testimony or any other source of information that will assist the Bureau's investigation.
166. Proffers are generally provided on a "without prejudice" basis by a leniency applicant's counsel and all information will be treated as settlement privileged. During the proffer the leniency applicant must describe the unlawful conduct in detail, including all parties to the offence and the full scope of the leniency applicant's criminal liability.
167. With respect to the party who received the first-in leniency marker, once its proffer is complete, the Bureau ordinarily will seek to schedule and conduct interviews with key witnesses who are eligible to be included in the plea agreement as described in paragraphs 145 to 151.
168. With respect to the second and subsequent leniency applicants, once its proffer is complete, the Bureau ordinarily will seek to schedule and conduct an interview with a key witness.³⁸ The witness to be interviewed will be selected by the Bureau after consulting with the leniency applicant and may be included in a plea agreement and dealt with in the same manner as the first-in leniency applicant key witnesses.

³⁸ The Bureau may seek additional interviews when a single witness is incapable of describing in sufficient detail all conduct that is the subject of the leniency application.

-
169. The Bureau and DPP place great importance and weight on witness interviews. Consequently, the interviews may be taken under oath and video recorded. The evidence provided will be under settlement privilege and on a "use immunity"³⁹ basis and will not be used directly against the witness or the leniency applicant providing the witness except as described in paragraphs 170 and 171.
 170. The objectives of the interviews described in paragraphs 167 and 168 include: 1) obtaining evidentiary support for the allegations made in the course of the proffer so that the Bureau can support its recommendations to the DPP, and 2) obtaining evidentiary support for court applications and prosecutions of other parties to the offence. Admissions made in the course of the interview may provide a basis for the agreed statement of facts to be used in support of the applicant's guilty plea.
 171. If applicable, the witness's statement may be used to impeach or cross-examine the witness if their court testimony is materially inconsistent with the statement previously provided to the Bureau.
 172. Where applicable, the leniency applicant must provide records relevant to an interview of the witness. These records should be provided to the Bureau at least two weeks before the interview. The leniency applicant is expected to explain the relevance and significance of the records in relation to the witness. The records may be provided on a settlement privilege and "use immunity" basis and will not be used directly against the witness or the leniency applicant providing the witness, except as described in paragraphs 170 and 171.⁴⁰
 173. The principles found in paragraphs 88 to 94 of the Immunity Program apply equally in the context of interviews undertaken pursuant to the Leniency Program. Please refer to Part One of this document. To the extent of any inconsistency, the information found in Part Two applies to the Leniency Program.
 174. The Bureau considers this stage of the Leniency Program to be complete when it has received sufficient information to make a comprehensive leniency recommendation to the DPP based on all available relevant information. Leniency applicants should appreciate that the Bureau will be consulting various sources of information, including existing immunity and other leniency applicants, with a view to determining the facts relevant to an informed leniency recommendation as well as the facts relevant to the operation of the cartel, more generally, before making a leniency recommendation to the DPP. The Bureau expects that leniency applicants will continuously provide any new information they become aware of and will provide timely responses to any questions the Bureau may have. The Bureau will not make a leniency recommendation before the leniency applicant has substantially completed its internal investigation.
 175. When a leniency applicant does not demonstrate, or is not prepared to plead guilty to, an offence, the Bureau will not make a leniency recommendation to the DPP and will request that the leniency applicant withdraw its leniency marker. In the event the leniency applicant does not withdraw its leniency marker, the leniency marker will be cancelled by the Deputy Commissioner, following a minimum of 14 calendar days notice.

³⁹ For further discussions on "use immunity" see Chapter 4 of the PPSC Deskbook.

⁴⁰ For greater certainty, leniency applicants who previously provided records to the Bureau in response to a court order will not be permitted to submit the same documents on a "without prejudice" basis under the Leniency Program, and the Bureau will be at liberty to use them as it sees fit, at its sole discretion.

Step 3: The Leniency Recommendation

176. After considering the relevant information, collected from the leniency applicant and elsewhere, the Bureau will advise the DPP of the leniency applicant's role in the cartel. The Bureau will further identify and provide an assessment of the cooperation and evidence that the leniency applicant has provided. On this basis, the Bureau will provide its recommendation with respect to the terms of a plea.
177. The leniency recommendation will be based on all existing information as it relates to the leniency applicant's culpability. The decision to provide the DPP with a leniency recommendation will not consider the likelihood of a co-conspirator prosecution.
178. The DPP has independent discretion to accept or reject the Bureau's leniency recommendation. However, the PPSC Deskbook provides that the PPSC should consult with the Bureau and give due consideration to its recommendation.⁴¹

Step 4: The Plea Agreement

179. A plea agreement between the DPP and a leniency applicant establishes the agreed terms and conditions under which the applicant will be recommended to be provided with leniency in sentencing. The agreement sets out the applicant's obligations to, in a timely fashion, provide full, complete and truthful disclosure and complete and ongoing cooperation throughout the Bureau's investigation and any subsequent prosecution. It also states who is covered by the agreement, how information provided by the leniency recipient will be treated and under what circumstances the agreement can be revoked.
180. Plea discussions with the leniency applicant are conducted and led by the DPP. The Bureau may attend to assist the DPP with any details about the leniency applicant's cooperation and the value of such cooperation to the Bureau's investigation.
181. The plea agreement reached with the DPP will be conditional on the complete, timely and ongoing cooperation of the leniency applicant, and others covered under its terms, with the ongoing investigation and any related prosecution. The plea agreement will require the leniency applicant to provide disclosure of all non-privileged information, records or other materials in its possession, under its control or available to it, wherever located, that in any manner relate to the unlawful conduct for which leniency is sought.
182. In order to reach a plea agreement, the DPP expects a sufficient evidentiary foundation permitting it to determine that the proposed plea, including the proposed leniency credit, is factually and legally sound and in the public interest.
183. In cases where the DPP determines that a leniency applicant's claim regarding ability to pay should be considered, the Bureau will assess the claim. Claims must be supported by persuasive evidence before any reduction in the fine or an adjusted payment schedule will be recommended by the Bureau to the DPP. An organization will be required to provide financial information about its assets, liabilities, revenues and equity.

⁴¹ The Bureau and PPSC recognize that in certain cases early participation by PPSC, in the analysis of the evidence upon which a recommendation will be based, may be appropriate.

-
184. To make a recommendation to the DPP, the Bureau may request that an independent expert accountant review the organization's financial information at the expense of the leniency applicant. In the case of an individual, when a fine is recommended, the Bureau may require the individual to provide information about their financial circumstances, including all sources of income, property, bank and investment records, tax filings and other relevant records necessary to make a determination as to his or her ability to pay.
 185. Where the Bureau becomes aware, before a plea is entered in court, that a leniency applicant does not meet or has not met the terms and conditions set out in its plea agreement, the Bureau may make a recommendation to the DPP that the applicant's plea agreement be revoked. The Bureau will discuss the situation with the leniency applicant and provide it an opportunity to address any shortfalls in its conduct as quickly as possible before making a recommendation for revocation to the DPP.
 186. As a result of the Bureau's recommendation, or on its own initiative, the DPP may revoke a plea agreement, before a plea is entered in court, where the leniency applicant does not meet all of the terms and conditions of that agreement, and take further action against the leniency applicant as appropriate in the circumstances. Where the DPP determines that the leniency applicant has failed to fulfil the terms and conditions set out in its plea agreement, the DPP will provide a minimum of 14 calendar days notice to the leniency applicant so that it has an opportunity to remedy its failure before revoking the plea agreement.
 187. Revocation of a plea agreement will affect only the individual or organization that is not cooperating or that otherwise fails to comply with the plea agreement. An organization's plea agreement can be revoked while its cooperating directors, officers, employees or agents who are covered under the agreement retain their protection. Likewise, it is possible for an individual's coverage under a plea agreement to be revoked while the organization remains covered.
 188. A corporate and individual plea agreement is available from the DPP.

Step 5: Full Disclosure

189. At the full disclosure stage, the topics addressed by a leniency applicant will generally be the same as those addressed at the proffer stage, but will be covered in greater detail. The Bureau will want to view and obtain copies of records and interview witnesses. These interviews will ordinarily be made under oath and video recorded. The full disclosure process can be expensive and time-consuming, and the leniency applicant must be prepared to dedicate the appropriate resources to support the Bureau's interest in conducting an expeditious and thorough investigation.
190. A leniency applicant is expected to complete its production of information, records, and other materials affording evidence to the Bureau as soon as possible after the plea agreement is concluded and ordinarily within six months. Individuals covered by the plea agreement will attend interviews and testify in prosecutions of the other parties to the cartel, as required. Leniency applicants that are business organizations must take all lawful measures to secure the cooperation of current directors, officers, and employees, as well as any agents or former directors, officers and employees covered by the plea agreement.
191. Leniency applicants have a positive obligation to update all information promptly as they become aware of either new or corrected information, records or witnesses. This must be done on an ongoing basis regardless of whether or not the Bureau has specifically asked for the information.

-
192. Accuracy of the information provided by leniency applicants is critical. The Bureau relies on this information to pursue its investigation of other participants to the alleged offence. Because timelines in an investigation can be critical, a leniency applicant's lack of timely cooperation can jeopardize the investigation.
193. A leniency applicant that provides false or misleading information to the Bureau or fails to fully cooperate in accordance with its obligations under the plea agreement may face revocation of the plea agreement. The leniency applicant may also face a criminal charge of obstructing a Bureau inquiry or examination under section 64 of the Act or of destroying or altering records under section 65 of the Act. Providing false or misleading information can also lead to charges, including perjury or obstruction, under the *Criminal Code*.
194. In addition to the above, disclosure made in the course of a leniency application generally follows the same principles and requirements described in paragraphs 83 through 101 of the Immunity Program. Please refer to Part One of this document. To the extent of any inconsistency, the information found in Part Two applies to the Leniency Program.

Step 6: Court Proceedings: Entering the Plea

195. The DPP and counsel for the leniency applicant will make a joint sentencing submission based on an Agreed Statement of Facts, which serves as the basis for both the plea and recommended sentence. The Agreed Statement of Facts will set out a sufficient factual basis to enable the court to make a determination that an offence has been committed and that the recommended sentence is appropriate.
196. The Bureau will not recommend that the DPP delay the filing of the information⁴² at the request of the leniency applicant unless there are compelling reasons to do so and provided that the Bureau's investigation or the DPP's prosecution of other parties to the offence will not be impeded. The DPP has independent discretion when deciding whether or not to delay the filing of an information.
197. The plea is public and is ordinarily taken in open court. The documents substantiating the plea are public as well.⁴³ An Agreed Statement of Facts typically will be filed with the court and oral or written representations will be provided by the DPP to the court outlining considerations relevant to the plea, such as the nature of the cartel offence, the applicant's role in the offence and other relevant details, including the relevant product, the duration of the cartel and the affected volume of commerce in Canada.

Step 7: Ongoing Cooperation and Testimony

198. The cooperation obligation owed by the leniency applicant and cooperating individuals to the Bureau and DPP is not necessarily completed upon the entering of a guilty plea into court and is extinguished in accordance with the terms of the plea agreement negotiated with the DPP.

⁴² An information is a formal criminal charge which initiates a criminal proceeding.

⁴³ The plea agreement is a private agreement between the DPP and the leniency applicant. It is not used to substantiate the plea and ordinarily is not released by the Bureau or the DPP into the public domain. In certain contexts, a plea agreement may be disclosed, for example, to the other cartelists as part of the Crown's disclosure obligation in a prosecution of them or if ordered by a court.

-
199. Generally, the cooperation obligation will be terminated by the DPP following: 1) the lapse of the statutory period to file a notice of appeal, when no party seeks to appeal the trial court decision in the event of a criminal prosecution; or 2) when the Commissioner and DPP have no reason to believe that further assistance from the leniency applicant or cooperating individuals could be necessary.

CANCELLATION OF LENIENCY MARKER AND WITHDRAWAL FROM THE LENIENCY PROGRAM

200. If a proffer is not completed within 30 calendar days from the date of the marker, and if no extension has been granted, if disclosure has been insufficient or where the Bureau is informed by the DPP that plea discussions have been terminated because the parties are unable to reach an agreement, the Bureau will cancel the leniency applicant's marker.
201. Should a leniency applicant have its marker cancelled or alternatively withdraw from the Leniency Program at any time before concluding the plea agreement, the applicant can be assured that information provided under the Leniency Program will not be used directly against it and will be treated as either confidential or settlement privileged, depending on the facts.

LEGAL PRIVILEGE

202. All information provided during the pre-plea agreement steps of the Leniency Program, including witness interviews and records created for the purpose of the proffer or plea negotiations and the plea agreement itself will be treated as settlement privileged.
203. Information provided by the leniency applicant during the pre-plea agreement steps may be used by the Bureau to further its investigation. This information will not be used directly against the leniency applicant or its cooperating individuals and will be treated by the Bureau as confidential. To this end, the Bureau's policy on confidentiality, as discussed in Part Three, will apply.
204. As part of the leniency applicant's ongoing cooperation obligations, once the plea agreement is concluded, all information provided by the leniency applicant prior and pursuant to the plea agreement may be used by the Bureau in its investigation and by the DPP in any subsequent prosecution against other parties to the offence.
205. The Bureau may take the position that public interest privilege, as well as other legal privileges, apply to information provided by the leniency applicant either before or after the conclusion of the plea agreement, depending on the particular circumstances at hand.

PART THREE: MATTERS COMMON TO THE IMMUNITY AND LENIENCY PROGRAMS

TREATMENT OF INFORMATION

Confidentiality

206. The Bureau's policy on confidentiality with respect to immunity and leniency applicants and the information they

provide is over and above that provided in section 29 of the Act⁴⁴. The Bureau treats the identity of immunity and leniency applicants or any information provided by the applicant as confidential, except where:

- a) disclosure is required by law;
- b) disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
- c) disclosure is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- d) the party has agreed to disclosure;
- e) there has been public disclosure by the party;
- f) disclosure is necessary to prevent the commission of a serious criminal offence; or
- g) in the case of information other than the immunity or leniency applicant's identity, where disclosure of such information is for the purpose of the administration or enforcement of the Act.

- 207. The operation of the confidentiality provisions found in paragraph 206 is further qualified by the following paragraphs.
- 208. The Bureau will not disclose the identity of an immunity or leniency applicant or the information provided by that applicant to any foreign law enforcement agency without the consent of the applicant or unless required by law (e.g., in response to an order of a Canadian court of competent jurisdiction).
- 209. Typically, the identity of an applicant will remain confidential until the applicant enters a guilty plea into court or until charges are laid against other participants to the offence and disclosure of the DPP's case to the accused is required.
- 210. Applicants should be aware, however, that their identity may be disclosed before charges are laid if the Bureau relies on their evidence in an application to a Canadian court for a search warrant, production order or judicial authorization of any investigative measure. Recourse to search warrants and production orders, among other things, can be of utmost importance to an investigation. To obtain court authorizations, the Bureau must provide the court with information that there are reasonable grounds to believe that an offence has been, or will be, committed. The Bureau will rely on the information provided by the applicant to establish these grounds.
- 211. The Bureau will not allow an applicant's interest in maintaining confidentiality to jeopardize the Bureau's ability to effectively enforce the Act. However, the Bureau will take all reasonable steps to ensure that this type of early

⁴⁴ Section 29 is the provision in the Act that deals with the communication of information in the possession or control of the Bureau, whether it was provided voluntarily or obtained by court order. The section prohibits communicating both the information and the identity of any persons who provided it, subject to limited exceptions, which include:

- 1) to a Canadian law enforcement agency;
- 2) for the purposes of the administration or enforcement of the Act;
- 3) information that has been made public; and
- 4) information that has been authorized for communication by the person who provided the information.

disclosure does not occur, except where necessary. The Bureau will draft applications to the courts for authorization of investigative powers, referred to as an "Information to Obtain" (ITO), in a manner designed to secure the protection of an applicant's identity, unless the Bureau is of the view that such drafting would not provide sufficient grounds to obtain the authorization requested.

212. If the identity of the applicant cannot be kept confidential when the Bureau applies for such authorization, it will request that the ITO, or relevant portion thereof, be sealed until charges are laid. If a party challenges the sealing order before a court to access the ITO, the Bureau will recommend to the DPP that it resist the disclosure of the applicant's identity and provide a redacted version of the ITO, with the identity of the applicant kept confidential, unless the court orders otherwise. Where it appears likely that disclosure is unavoidable, the Bureau will advise the applicant as soon as possible.

INTERNATIONAL CRIMINAL ANTI-COMPETITIVE ACTIVITY

213. The timing of an approach to the Bureau can be critical to the options available to a potential immunity applicant. A party considering an application for immunity should appreciate that when the matter involves other countries, the Bureau may be aware of the matter as a result of a foreign investigation before being approached.
214. In matters involving multiple jurisdictions, a party should consider approaching each jurisdiction's competition law authority, or the authority responsible for deceptive marketing practices, in an effort to secure its advantage under all applicable immunity programs. A party whose business activities have a substantial connection to Canada should contact the Bureau before, or immediately after, approaching foreign competition law authorities. The Bureau will not afford any special consideration to an immunity or leniency applicant solely because it has been granted immunity or another form of favourable treatment in another jurisdiction.
215. As part of an applicant's ongoing cooperation, absent compelling reasons, the Bureau will expect the applicant to provide its consent in the form of a waiver allowing communication of information with jurisdictions to which the applicant has made similar applications for immunity or leniency. Such waivers shall be provided immediately and are expected to cover both substantive and procedural information.

PRIVATE CIVIL ACTIONS

216. Where an immunity or leniency applicant is a member of a joint defence agreement in a civil action, it must be mindful that its first obligation is to provide complete, timely and ongoing cooperation to the investigation and prosecution of the offence for which immunity or leniency is sought.
217. Arrangements entered into in respect of a coordinated defence to a civil action must be subordinate to the overriding commitment owed under the Immunity and Leniency Programs and the terms of the immunity or plea agreement, as the case may be. Further, immunity and leniency applicants must keep the Bureau and the DPP apprised on an ongoing basis of the general status of any civil action in which it is involved.
218. The Bureau has no interest in forestalling cooperation or in penalizing an immunity or leniency applicant for early disclosure or cooperation in a civil action. In the event that it wishes to cooperate with a civil litigant in exchange for "credit" in respect of any civil liability that may be owed, this interest should be communicated as early as possible to the Bureau and the DPP. This will enable the Bureau and the DPP to determine how the immunity or leniency applicant might provide cooperation in the civil action without jeopardizing the Bureau's criminal investigation or the DPP's prosecution. Failure by an immunity or leniency applicant to advise the Bureau and the DPP of its activities in this regard may jeopardize the applicant's status under the Immunity or Leniency Programs.

-
219. The Bureau's policy with respect to private actions under section 36 of the Act is to disclose the identity of, or any information provided by, an immunity or leniency applicant only in response to a court order. In the event of such an order, the Bureau will take all reasonable steps to protect the confidentiality of the information and the identity of the applicant, including seeking protective court orders.

HOW TO CONTACT THE COMPETITION BUREAU

The Bureau encourages the public to take advantage of its policies and programs, which facilitate conformity with the provisions of the *Competition Act*. Anyone wishing to apply under the Commissioner's Immunity or Leniency Programs may contact:

Deputy Commissioner, Cartels Directorate

819-994-8270

Deputy Commissioner, Deceptive Marketing Practices Directorate

819-953-3902

Contact the Competition Bureau's Information Centre for further information:

Web site

www.competitionbureau.gc.ca

Address

Information Centre Competition Bureau
50 Victoria Street Gatineau, Quebec K1A 0C9

Telephone

Toll-free: 1-800-348-5358

National Capital Region: 819-997-4282

TTY (for hearing impaired) 1-866-694-8389

Facsimile

819-997-0324

APPENDIX 1: CRIMINAL PROVISIONS OF THE COMPETITION ACT

Part VI of the Act prohibits under criminal sanction: bid rigging, agreements between competitors to fix prices, allocate markets or restrict production, false or misleading representations and deceptive marketing practices. For operational and statistical purposes, those offences found in sections 45 to 49 (Table 1) are treated separately from the criminal false or misleading representations and deceptive marketing practices provisions found in sections 52 through 55.1 (Table 2).

TABLE 1

Provisions of the *Competition Act* under the responsibility of the Deputy Commissioner, Cartels Directorate

Section 45	On or after March 12, 2010: Conspiracies, agreements or arrangements between competitors or potential competitors to fix prices, allocate markets or restrict the supply of a product. Prior to March 12, 2010: Conspiracies, combinations, agreements or arrangements to lessen competition unduly in relation to the supply, manufacture or production of a product.
Section 46	Conspiracies, agreements or arrangements that are implemented in Canada as a result of directives, instructions, intimations of policy or other communication from a person outside of Canada, in a position to direct or influence the policies of the corporation, for the purpose of giving effect to a conspiracy, and that, if entered into in Canada, would have been in contravention of section 45.
Section 47	Bid rigging, when two or more persons agree that one party will refrain from bidding in a call for tenders, or when there is collusion in the submission or withdrawal of bids, unless such actions are made known to the tendering authority.
Section 48	Conspiracies, combinations, agreements or arrangements that limit unreasonably the opportunities, terms or participation of a player or competitor in professional sports, or to limit unreasonably the opportunity to negotiate with or play for a professional team or club.
Section 49	Subject to a number of exceptions explained in section 49 (2), any agreement between two or more federal financial institutions with respect to interest rates or charges on deposits or loans, service charges to customers, kinds of services provided, or the person or classes of persons to whom a loan or other service will be provided or withheld.

TABLE 2

**Provisions of the Competition Act under the responsibility of the
Deputy Commissioner, Deceptive Marketing Practices Directorate**

Paragraph 52 (1)(a)	Knowingly or recklessly making representations that are false or misleading in a material respect for the purpose of promoting a product or any business interest.
Section 52.01	Knowingly or recklessly send or cause to be sent false or misleading representations pertaining to the sender, the subject matter, the content or the locator information in an electronic message or locator for the purpose of promoting a product or any business interest.
Section 52.1	While engaging in telemarketing (the practice of using interactive telephone communications for the purpose of promoting the supply of a product or any business interest): • failing to disclose the identity of the person on whose behalf the communication is being made, the purpose of the communication and the nature of the product or business being promoted; • making a representation that is false or misleading in a material respect; • requiring any advance payment as a condition for receiving a prize that has been, or supposedly has been, won in a contest or game; • failing to provide adequate and fair disclosure of the value of the prizes and of any fact that materially affects the chances of winning; • offering a gift (or any product at less than fair market value) as an inducement to buy another product, without fairly disclosing the value of the gift; or • requiring payment in advance for any product offered at a price grossly in excess of its fair market value.
Section 53	Sending or causing to be sent a document or notice if the document or notice gives the general impression that the recipient has won or will win a prize or other benefit, and if the recipient is also asked or given the option to pay money, incur a cost or do anything that will incur a cost.
Section 54	Supplying a product at a price that exceeds the lowest of two or more prices that are clearly shown on the product, its container, wrapper or display mount or on any in-store advertisement. This provision does not actually prohibit the existence of two or more prices, but requires that the product be offered for sale at the lowest price depicted.
Section 55	Making representations relating to compensation under a multilevel marketing plan without fair, reasonable and timely disclosure of compensation actually received (or likely to be received) by typical participants in the plan.

Section 55.1

Establishing, operating, advertising or promoting a pyramid-selling scheme, defined as a multilevel marketing plan under which:

- a participant pays for the right to receive compensation for recruiting another participant;
- a participant is required to purchase a specified amount of product (other than an amount bought at the seller's cost price for the purpose of facilitating sales);
- a participant is supplied with an unreasonable amount of product; or
- there is no right to return the product in saleable condition on reasonable terms, or the participant is not informed of the right to return the product.

APPENDIX 2: INFORMATION CHECKLIST

Topics to be covered in a proffer may include those set out below. This list is not intended to be exhaustive and the information required will depend on the facts and the relevant offence. For example, evidence of an undue lessening of competition will be required in the case of a conspiracy where some of the conduct pre-dates March 12, 2010 (when the current conspiracy provision came into force). Other information, such as the use of deceptive telemarketing scripts, is likely to be relevant only in the context of false or misleading representations and deceptive marketing practices.

The Parties

- a general description of the applicant and the other parties implicated in the conduct;
- the individuals involved in the offence;
- business ownership structures, including affiliations;
- the applicant's share of, and role in, the market;
- membership in, or involvement with, trade or other associations;
- the nature and level of involvement in the offence;

The Product

- the physical and technical characteristics of the product;
- quality claims;
- the end use and value of the product;

The Industry

- a general description of the industry and how it functions;
- how pricing in the industry works;
- the regulatory framework;
- the existence and nature of contracts;
- how the product is supplied;
- customer or supplier countervailing power;
- use of targeted lists by telemarketers;

Market Information

- other market participants (domestic or foreign) and their market shares;
- a description of key customers in Canada and elsewhere;
- the geographic locations of sellers and customers;

The Conduct

- a description of the conduct, including the nature and timing of communications among competitors or corporate policies or procedures designed to deceive customers;
- the time period of the conduct;
- the geographic scope of the conduct;
- the representations involved and the medium;
- monitoring or enforcement measures utilized in carrying out the offence;
- whether any agreements or arrangements were set out in writing;
- whether other participants continue to engage in the conduct;
- measures taken to conceal the conduct or the identity of the participants;
- measures taken to launder money;
- re-loading (or re-victimizing) customers;
- selling of customer lists;
- targeting vulnerable groups;
- abusive or threatening behaviour relating to the offence;

Impact of the Conduct

- the volume of commerce affected in Canada, whether directly or indirectly, along with a description of the methodology, data and sources used to make or support that determination;
- pricing and other effects;
- whether customers or potential customers are aware of the conduct or have complained about it;
- any product substitutes and their price levels (including transportation costs);
- barriers to entry into the market;
- costs for a customer to switch to an alternate product;

Evidentiary Process

- a general description of: the steps taken in the applicant's internal investigation including information related to how the applicant became aware of the unlawful conduct and its internal response; as well as the steps taken to investigate the conduct, including the names of all individuals interviewed and a summary of their statements and responses relevant to the offence;
- a general description of witnesses who the applicant believes could testify about the conduct and the anticipated nature of their evidence;

-
- a description of all relevant records available to the applicant at that point in time;
 - identification of any relevant records or witnesses that are unavailable and the reasons for the unavailability, including specifics of any claimed privilege, evidence destruction or attempts to obstruct the Bureau's investigation;

International Issues

- whether the applicant has made, or will make, an application for immunity or leniency in other jurisdictions and the identity of those jurisdictions; and

Private Actions

- whether the applicant is a defendant in any civil actions in Canada, or elsewhere, respecting the conduct and the general status of any such civil actions.

Required if the section 45 conduct pre-dates March 12, 2010, and the offence requires proof of undue-ness:

Prior to March 12, 2010, section 45 of the Act prohibited agreements that prevent or lessen competition unduly or enhance prices unreasonably. A conspiracy under the previous provision must meet the threshold of undue-ness or unreasonableness before it can be considered a criminal offence. It is the combination of market power and behaviour likely to injure competition that makes a lessening of competition undue.

The determinants of market power include such factors as market shares, the number of competitors and the concentration of competition, barriers to entry, geographical distribution of buyers and sellers, differences in the degree of integration among competitors, product differentiation, countervailing power and cross-elasticity of demand. When parties engage in particularly injurious behaviour contrary to the former section 45 of the Act, such as price-fixing, liability may be triggered even when market power is not considerable.

Market information provided by an applicant at the proffer stage enables the Bureau to assess the likely impact of the agreement and whether it has caused an undue lessening of competition. Applicants are required to address the issue, but are not required to demonstrate decisively to the Bureau that an undue lessening of competition has occurred in the case of conduct that pre-dates March 12, 2010.

APPENDIX 3: TEMPLATE DOCUMENTS



Service des poursuites
pénales du Canada

Public Prosecution
Service of Canada

COMPANY – MODEL LETTER - GRANT OF INTERIM IMMUNITY (GII)

PRIVILEGED & CONFIDENTIAL

Date

Addressee (Counsel)

Dear [insert]:

RE: Grant of Interim Immunity – ABC Corporation [insert name]

I am writing further to ABC Corporation's [ABC] application to the Commissioner of Competition [the Commissioner] for immunity pursuant to the *Immunity and Leniency Programs under the Competition Act* [Immunity Program] of the Competition Bureau of Canada [the Bureau].

I understand that ABC applied for and was granted a first-in marker by the Bureau in relation to anticompetitive conduct believed to be a violation of the *Competition Act* [the Act]. Since that time, ABC has provided the Bureau with additional information in relation to the anticompetitive conduct.

Based on the information received to date, the Commissioner has recommended to the Director of Public Prosecutions [DPP] that ABC and its current directors, officers and employees receive an Grant of Interim Immunity [GII] in order to facilitate the Bureau's investigation of the anticompetitive conduct and as a step toward a grant of final immunity from prosecution under the Act for potential offences associated with the anticompetitive conduct in question.

Based on the information gathered to date, and subject to the further collection of information and analysis, the anticompetitive conduct is described as:

...that ABC....[describe conduct]

The basis for the Commissioner's recommendation is that ABC appears to meet the eligibility requirements of the Immunity Program, including that:

- (a)(i) the Bureau was unaware of an offence, and ABC was the first to disclose all of the elements of the offence;
OR
- (a)(ii) the Bureau was aware of an offence, and ABC was the first to come forward before the Bureau gathered sufficient evidence to warrant a referral of the matter to the DPP;
- (b) ABC has terminated its participation in the unlawful activity;
- (c) ABC has represented that it has not coerced others to be a party to the unlawful activity; and
- (d) ABC has provided information that demonstrates it was a party to the anticompetitive conduct believed to be a contravention of the Act.

Upon review of the Bureau's recommendation, the DPP is prepared to offer ABC a GII at this time. A draft agreement that reflects the GII accompanies this letter.

A copy of the Immunity Program is attached as Appendix 1 to the GII and serves as further background to the operation of the Immunity Program including the expectations and obligations associated with the GII.

As is indicated in these materials, should ABC accept and commit to the GII, the following conditions will apply to ABC.

- a) ABC agrees to provide Bureau investigators with full disclosure of all non-privileged information, evidence or records in ABC's possession, under its control or available to it, wherever located, that, in any manner, relate to the anticompetitive conduct.
- b) ABC's production of information and records within the disclosure process will be timely and will be completed within a schedule established between the Bureau and ABC, unless an exception to the schedule is warranted.
- c) ABC accepts its obligation to bear the cost of collecting and producing information and records within the disclosure process and is prepared to dedicate appropriate resources to meet the timely production of this information.
- d) ABC will take all lawful measures to secure the cooperation of current directors, officers and employees, as well as any agents or former directors, officers or employees specifically covered by this agreement, and to facilitate the ability of these individuals to appear for interviews and provide testimony in judicial proceedings at ABC's expense. (The individuals covered by this GII to date are described in Appendix 2 to the GII.)
- e) ABC will cooperate with Bureau investigators as part of furthering the Bureau's investigation of the anticompetitive conduct. This cooperation includes providing truthful and accurate information, a willingness to assist investigators locate information that is most pertinent, as well as an obligation to update information and evidence promptly when ABC becomes aware of either new or corrected information, records or witnesses.
- f) Unless made public by the DPP or the Commissioner, or as may be ordered by a Canadian court of competent jurisdiction, ABC shall not disclose the existence of this GII, nor the substance of the matter under investigation, without the consent of the DPP.

ABC should also understand that providing false or misleading information to the Bureau, failure to cooperate in accordance with its obligations under the GII and/or noncompliance with the terms and conditions of the GII or obligations under the Immunity Program, including eligibility requirements, can lead to revocation of the GII and possible charges under the Act or the *Criminal Code*.

Should ABC accept and commit to the GII, the Bureau and the DPP will not use any of the information disclosed by ABC against ABC or the individuals listed in Appendix 2, unless ABC or the individual has been found to be ineligible for immunity or has otherwise failed to comply with the GII or obligations under the Immunity Program.

Additionally, no current director, officer or employee, and no agent or former director, officer or employee covered by this GII, will be carved out of the GII for any reason other than a failure to admit its knowledge of or participation in the anticompetitive conduct, a failure to cooperate in a complete, timely and ongoing manner or actions which lead to the revocation of a GII.

This offer of a GII is also premised on ABC having the intention to meet the obligations associated with the agreement in order to receive a grant of final immunity. The DPP will provide a grant of final immunity to ABC once ABC has satisfied all of its obligations under the GII, including, if necessary, testifying in court proceedings.

As indicated, should ABC agree with the content of this letter and its obligations as an immunity applicant, the DPP is prepared to provide ABC with an IGI as a step toward ABC receiving final immunity from prosecution under the *Competition Act* for the anticompetitive conduct described in the agreement.

Yours very truly,

PPSC counsel

COMPANY – MODEL GII AGREEMENT



Service des poursuites
pénales du Canada

Public Prosecution
Service of Canada

THIS AGREEMENT IS BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,

as represented by the

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA

- and -

ABC CORP [insert name]

This document sets out the terms and conditions of an agreement between Her Majesty the Queen in right of Canada, as represented by the Director of Public Prosecutions of Canada [DPP] and **ABC Corp [ABC]** governing the grant of immunity from prosecution under the *Competition Act* [the Act].

This grant of interim immunity [GII] follows an application to the Commissioner of Competition [the Commissioner] for immunity pursuant to the *Immunity and Leniency Programs under the Competition Act* [Immunity Program] (attached as Appendix 1) of the Competition Bureau of Canada [the Bureau].

This grant of interim immunity relates to anticompetitive conduct contrary to ... section(s) ... of the Act with respect to ...[brief outline of conduct that is the subject of the application].

This agreement is conditional and depends upon **ABC** satisfying the terms and conditions set out below. This interim immunity will become final when ABC has met its obligations under this agreement and written acknowledgement of such has been issued by the DPP.

The parties agree and undertake as follows:

1. **Definitions:** In this agreement,

"anticompetitive conduct" means...[definition/description of anticompetitive conduct and its time frame that is covered by the immunity agreement];

"cooperation" means complete, timely and ongoing cooperation, at **ABC**'s own expense throughout, with the DPP and the Commissioner in connection with the investigation of the anticompetitive conduct and in any proceedings that may be instituted by the DPP in relation to the anticompetitive conduct, and as more fully described in paragraphs 3 through 5 of this agreement;

"confidential information" means this agreement and any information that in any way relates to the investigation of the anticompetitive conduct;

"disclosure", as used in paragraphs 3 through 5 of this agreement, means full, complete, frank and truthful disclosure of all non-privileged information, evidence or records relating to the anticompetitive conduct;

"person in breach" means any person granted interim immunity by this agreement who has failed to fulfill any one of the terms or conditions set out in this agreement; and

"**ABC**" means [explanation of company and affiliates who are covered by this agreement – as appropriate].

2. **Representations:** **ABC** represents that:

- a) it has reported to the Commissioner and the DPP that it has engaged in the anticompetitive conduct;
- b) it has taken effective steps to terminate its participation in the anticompetitive conduct;
- c) it has not coerced others to be a party to the anticompetitive conduct; and
- d) it has revealed to the DPP and the Commissioner any and all conduct of which it is aware that may constitute an offence under the Act.

3. **Cooperation and Disclosure:** **ABC** has provided and shall continue to provide as necessary disclosure and cooperation to the DPP and the Commissioner, including, but not limited to:

- a) all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, whether or not requested by the DPP or the Commissioner, that in any manner relate to the anticompetitive conduct. Before providing the information, evidence and records, **ABC** will consult with the Commissioner with respect to the relevance and scope of such information, evidence and records and the form in which such information, evidence and records will be provided to the Commissioner;
- b) using all measures, lawful where taken, and as authorized by the Bureau as required, to secure the cooperation of the current and former directors, officers, employees, and agents of **ABC**, and encouraging such persons to provide voluntarily to the DPP and the Commissioner all of their non-privileged evidence, information and records that in any manner relate to the anticompetitive conduct;
- c) facilitating, in accordance with the conditions set out in the Immunity Program, the ability of current and former directors, officers, employees, and agents to appear for interviews and to provide testimony in connection with the anticompetitive conduct as the DPP or the Commissioner may require, at the times and places designated by the DPP or the Commissioner; and
- d) revealing any and all conduct of which it becomes aware that may constitute an offence under the Act.

4. **Corporate Immunity:** Having considered the recommendation of the Commissioner and, after an independent review pursuant to the policy of the DPP as set out in the PPSC Deskbook, conditional upon:

- a) the veracity of the representations contained in paragraph 2 above; and

-
- b) the disclosure by and cooperation of **ABC** as required pursuant to this agreement;
 - c) **ABC**'s compliance with the terms and conditions of this GII;

the DPP grants **ABC** interim immunity from prosecution under the Act in respect of the anticompetitive conduct.

5. **Immunity of Individuals Covered by Corporate Interim Immunity Agreement:** Subject to the veracity of the representations contained in paragraph 2, the DPP grants to the current and former directors, officers, employees, and agents of **ABC** identified in the GII for **ABC** ["individuals" and singularly "individual"] immunity from prosecution under the Act in respect of the anticompetitive conduct conditional on their admission of their knowledge of and participation in the anticompetitive conduct and on their continuing cooperation with the DPP or the Commissioner as outlined in the Immunity Program and any further correspondence between those parties.
6. If at any time the Commissioner or the DPP should determine that **ABC** did not, or does not as required, satisfy the terms and conditions of this agreement and its immunity under this agreement is revoked, individual protection under this agreement will continue on the following basis: the individual has complied and continues to comply fully with his/her obligations under this agreement; no grounds exist to revoke the individual's immunity; and, the individual's immunity has not been previously revoked pursuant to paragraph 14 of this agreement.
7. **Confidentiality:** The DPP and the Commissioner shall not disclose to any third party the identity of **ABC** or the individuals covered by this agreement, except where:
 - a) disclosure is required by law;
 - b) disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
 - c) disclosure is necessary for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
 - d) **ABC** has agreed to disclosure;
 - e) there has been public disclosure by **ABC**;
 - f) disclosure is necessary to prevent the commission of a serious criminal offence; or
 - g) in the case of information other than **ABC**'s identity, where disclosure of such information is for the purpose of the administration or enforcement of the Act.
8. The DPP and the Commissioner shall not disclose to any third party information obtained from **ABC** or individuals covered by this agreement, subject only to the exceptions listed above.
9. The DPP and the Commissioner shall not disclose the identity of **ABC** or individuals covered by this agreement, nor the information obtained from **ABC** or the individuals, to any foreign law enforcement agency without the consent of **ABC**, which consent will not be unreasonably withheld.

10. Unless made public by the DPP, or the Commissioner, or as required by law, neither **ABC** nor any individual covered by this agreement shall disclose confidential information to any third party, without the consent of the DPP, which consent will not be unreasonably withheld. Where disclosure is required by law, **ABC** or the individual shall give notice to and consult with the DPP prior to disclosure.
11. If any third party seeks to compel disclosure of confidential information from any party to this agreement, or any individual covered by this agreement, the party or individual from whom the information is sought shall give prompt notice to the parties to this agreement, and shall take all reasonable steps to resist disclosure unless the parties to this agreement consent to such disclosure.
12. **Failure to Comply with the GII:** The parties agree that full compliance with all the terms and conditions in this agreement by any person granted interim immunity by it, is fundamental to the agreement. The parties also agree that the accuracy and veracity of all representations required by this agreement by any person granted interim immunity by it is a condition of and fundamental to the agreement. Non-compliance with any of the aforementioned terms and conditions of this agreement by any person granted interim immunity by it constitutes a breach of the agreement by that person, which may result in revocation of interim immunity for that person or such other remedy as the DPP may determine.
13. **Grounds for Revocation:** If the DPP determines that **ABC** has misrepresented itself with respect to any of its representations under paragraph 2, has not provided the cooperation and disclosure required in paragraph 3, or has not complied with any other terms and conditions of this agreement, the DPP may revoke the interim immunity granted to **ABC** after fourteen (14) days prior written notice to counsel for **ABC**, and, absent exigent circumstances, will provide counsel with an opportunity to meet within the aforementioned fourteen (14) days with the DPP regarding the potential revocation.
14. If the DPP determines that an individual granted interim immunity by this agreement:
- a) has not provided the cooperation and disclosure required in paragraph 5;
 - b) has not complied with any other terms and conditions of this agreement or an individual GII;
 - c) continued to participate in the anticompetitive conduct after **ABC** notified the individual to cease doing so; or
 - d) obstructed, or attempted to obstruct justice;
- the DPP may revoke the interim immunity granted to the individual after fourteen (14) days prior written notice to counsel for the individual and to counsel for **ABC** and, absent exigent circumstances, will provide counsel with an opportunity to meet within the aforementioned fourteen (14) days with the DPP regarding the potential revocation.
15. Following revocation of interim immunity for a breach of this agreement, as described in paragraphs 12 through 14 above, the DPP may take such action against the person whose immunity has been revoked as the DPP considers appropriate, including prosecution under the Act or the *Criminal Code*. In any such action the DPP may use, in any way, any information, evidence, record, statement or testimony provided by any person at any time after the application for immunity and any evidence of any kind derived directly or indirectly from such information, evidence, record, statement or testimony provided. For greater certainty, any privilege that may apply in respect of any information, evidence, record, statement or testimony provided is deemed waived upon revocation of immunity.

-
16. **Use of Statements:** No information, evidence, record, or statement provided during an interview by any person granted interim immunity pursuant to this agreement will be used in evidence against that person in any proceedings undertaken by or on behalf of the DPP, except where the person granted interim immunity:
- a) subsequently gives in any trial, hearing, or judicial proceeding (including any proceeding in which the person is an accused) evidence that is materially different from the statement given in an interview;
 - b) is charged with perjury, giving contradictory evidence, fabricating evidence or obstructing justice; or
 - c) has had its interim immunity revoked after a breach of this agreement.
17. Nothing in this agreement affects the right of the DPP or the Commissioner to use any information, evidence, record, statement or testimony provided by any person under this agreement in order to discover or acquire other information, evidence, or records from another source.
18. **Privilege and Jurisdiction:** Nothing in this agreement, or any action taken pursuant to it, shall constitute:
- a) except for the deemed waiver mentioned in paragraph 15, a waiver of any privilege, by any party to this agreement; or
 - b) a submission to the jurisdiction of the Canadian courts by any person granted interim immunity by this agreement who is not present in Canada, except for the purpose of this agreement and proceedings related to the enforcement of this agreement.
19. **Applicable Law:** This agreement shall be construed in accordance with the laws of Canada.
20. **Entire Agreement:** This agreement constitutes the entire agreement between the DPP and ABC, including the individuals covered by this agreement, and supersedes all prior understandings or agreements, if any, whether oral or written, relating to the subject matter of this agreement.
21. **Notices:** Any notice required to be given under this agreement is deemed to be validly given if in writing and by pre-paid registered mail, courier delivery, facsimile transmission or electronic mail (e-mail) transmission to:
- a) The Director of Public Prosecutions of Canada
Attention: Public Prosecution Service of Canada, Competition Law Section
160 Elgin Street
Place Bell Canada, suite 1400
Ottawa, ON K1A 0H8
CANADA

Attention:
[Insert name and contact information]

b) The Commissioner of Competition

Attention: Senior Deputy Commissioner
Cartels and Deceptive Marketing Practices Branch
20th Floor, Place du Portage, Phase I
50 Victoria Street, Gatineau, QC, K1A 0C9
CANADA

Attention:
[Insert name and contact information]

c) **ABC**

Attention:

d) [Insert name and contact information] With copy to:

Attention: Counsel for **ABC**
Counsel for **ABC**
[Address of **ABC**]

22. **Execution in Counterparts:** This agreement may be executed in counterparts.
23. **The Commissioner Joins in this Agreement:** The Commissioner joins in this agreement solely for the purposes of giving effect to his rights and obligations as set out in paragraphs 7 to 11 and paragraph 17.
24. **Authority and Capacity:** The DPP, **ABC** and the Commissioner each represent and warrant to the others that the signatories to this agreement on behalf of each party to it have all the authority and capacity necessary to execute this agreement and to bind the respective parties to it. **ABC** represents that it has had an opportunity to consult Canadian legal counsel in respect of this **agreement**.

The signatories acknowledge the full and voluntary acceptance of the foregoing terms and conditions.

Dated at _____
this _____ day of _____, 20____.

Her Majesty the Queen in right of Canada as
represented by the Director of Public Prosecutions of Canada

Per: _____
Counsel for the Public Prosecution Service of Canada

Dated at _____
this _____ day of _____, 20____.

The Commissioner of Competition

The Commissioner of Competition

Dated at _____

ABC

this _____ day of _____, 20__.

Per: _____
[insert name and title of signing officer]

Counsel to **ABC**

EMPLOYEE – MODEL LETTER – CONFIRMATION OF COVERAGE FROM COMPANY GII



Service des poursuites
pénales du Canada

Public Prosecution
Service of Canada

Addressee (Counsel)

RE: Grant of Interim Immunity – INDIVIDUAL [insert name] covered by company GII

I am writing to clarify the immunity protection being made available to you as well as to outline the conditions and expectations associated with this grant of interim immunity.

ABC Corporation [ABC] applied to the Commissioner of Competition [the Commissioner] for immunity pursuant to the *Immunity and Leniency Programs under the Competition Act* [Immunity Program] of the Competition Bureau of Canada [the Bureau].

The anticompetitive conduct that formed the basis of ABC's application for immunity is described as:

...that ABC....[describe conduct]

Based on the information received to date, the Commissioner recommended to the Director of Public Prosecutions [DPP] that ABC receive an Grant of Interim Immunity [GII] in order to facilitate the Bureau's investigation of the anticompetitive conduct and as a step toward a grant of final immunity between the DPP and ABC.

Based on the Bureau's recommendation and the information provided to date by ABC, the DPP has provided to ABC a GII (a copy of which accompanies this letter) that also applies to any current director, officer or employee of ABC as well as any agent, former director, officer or employee covered by the GII.

ABC is bound by the requirements of its GII and those of the Immunity Program. A copy of the Immunity Program is attached as Appendix 1 to the GII and serves as further background to the operation of the Immunity Program, including the expectations and obligations associated with the GII.

Taking into consideration the recommendation of the Commissioner as well as information and representations made on your behalf, the DPP is prepared to extend an assurance that the protections afforded to ABC pursuant to the GII will be extended to you in order to facilitate further disclosure and investigation of the anticompetitive conduct.

Accordingly, this is to advise you that the DPP is granting you a GII from prosecution under the *Competition Act* [the Act] in respect of the anticompetitive conduct [specify time frame].

This GII is conditional upon you providing information and evidence to the Bureau and the DPP, and discharging all of the obligations described in the Immunity Program. For greater clarity, conditions associated with your GII include that you:

- (i) provide the Bureau with full disclosure of all non-privileged information, evidence or records in your possession, under your control or available to you, wherever located, that, in any manner, relate to the anticompetitive conduct;
- (ii) make yourself available for interviews (which may be under oath and taped or video-taped) in Canada at the expense of [ABC] upon the request of the Commissioner or the DPP at the times and places designated by the Commissioner or DPP;
- (iii) cooperate with Bureau investigators as part of furthering the Bureau's investigation of the anticompetitive conduct. This cooperation includes providing truthful and accurate information, a willingness to assist investigators locate information that is most pertinent, as well as an obligation to update information and evidence promptly should you become aware of either new or corrected information or records;
- (iv) not disclose the existence of this GII, nor the substance of the matter under investigation, without the consent of the DPP, unless this information is made public by the DPP or the Commissioner, or as may be ordered by a Canadian court of competent jurisdiction; and
- (v) when requested by the DPP, testify completely and truthfully under oath or solemn affirmation in proceedings commenced by the DPP in connection with the anticompetitive conduct being reported and, if applicable, attorn to the jurisdiction of Canada for purposes of service of any court process related to proceedings commenced by the DPP relating to the anticompetitive conduct being reported.

Providing false or misleading information to the Bureau, failure to cooperate in accordance with your obligations under the GII, or non-compliance with the terms and conditions of the GII can lead to revocation of this GII and possible charges under the Act or the *Criminal Code*.

The DPP confirms that neither the DPP nor the Commissioner will use any information you provided against you in any criminal proceeding unless there has been a failure to comply with the terms of this letter, the obligations under the Immunity Program or the GII provided to ABC, or as a result of actions that otherwise led to the revocation of this GII.

For further clarity, the commitments made in this letter have no application to any offences or other liabilities arising under the *Criminal Code* or any other federal, provincial, or municipal law.

Without limiting the generality of the foregoing, this agreement does not provide immunity from prosecution for perjury, the giving of contradictory evidence or obstruction of justice, if the circumstances warrant, or for conduct other than that disclosed to the Commissioner and the DPP.

If at any time the Bureau or the DPP should determine that [ABC] has not satisfied the requirements of its GII with the DPP, and therefore is no longer entitled to the protections encompassed by that GII, your protections will continue, so long as you continue to fully comply with your obligations.

Should ABC receive a grant of final immunity, unless specifically notified to the contrary, the grant of final immunity will apply to you as well, without the need for subsequent agreement.

Should you agree with the content of this letter and the conditions that will apply to you if granted a GII, the DPP is prepared to provide you with interim immunity. Please endorse the acknowledgement below and return an endorsed copy of this letter back to me.

Yours very truly,

PPSC Counsel

I request the DPP grant me the protections of the GII that has been granted to ABC.

I admit knowledge of (participation in) the anticompetitive conduct and am aware of the expectations and obligations associated with a GII.

Applicant

Date

INDIVIDUAL – MODEL LETTER – GII



Service des poursuites
pénales du Canada

Public Prosecution
Service of Canada

PRIVILEGED & CONFIDENTIAL

Date

Addressee (Counsel)

RE: Grant of Interim Immunity – INDIVIDUAL A [insert name]

I am writing further to A [insert name]'s **IND A** application to the Commissioner of Competition [the Commissioner] for immunity pursuant to the *Immunity and Leniency Programs under the Competition Act* [Immunity Program] of the Competition Bureau of Canada [the Bureau].

I understand that you are acting as counsel for **IND A** with respect to [his/her] application for immunity. It is also my understanding that **IND A** applied for and was granted a first-in marker by the Bureau in relation to anticompetitive conduct believed to be a violation of the Act. Since that time, **IND A** has provided the Bureau with additional information in relation to the anticompetitive conduct.

Based on the information received to date, the Commissioner has recommended to the Director of Public Prosecutions [DPP] that **IND A** receive a Grant of Interim Immunity [GII] in order to facilitate the Bureau's investigation of the anticompetitive conduct and as a step toward a grant of final immunity from prosecution under the Act for potential offences associated with the anticompetitive conduct in question.

Based on the information gathered to date, and subject to the further collection of information and analysis, the anticompetitive conduct is described as:

...that **IND A**....[describe conduct]

The basis for the Commissioner's recommendation is that **IND A** appears to meet the eligibility requirements of the Immunity Program, including that:

- (a)(i) the Bureau is unaware of an offence, and **IND A** is the first to disclose all of the elements of the offence; OR
- (a)(ii) the Bureau is aware of an offence, and **IND A** is the first to come forward before the Bureau gathers sufficient evidence to warrant a referral of the matter to the DPP;
- (b) **IND A** has terminated [his/her] participation in the unlawful activity;

-
- (c) **IND A** has represented that [he/she] did not coerce others to be party to the unlawful activity and is not the sole beneficiary of the illegal activity in Canada; and
 - (d) **IND A** has provided information that demonstrates [he/she] was a party to the anticompetitive conduct believed to be a contravention of the Act.

Upon review of the Bureau's recommendation, the DPP is prepared to offer **IND A** a GII at this time. A draft agreement that reflects the GII accompanies this letter.

A copy of the Bureau's Immunity Program is attached as an Appendix I to the GII and serves as further background to the operation of the Immunity Program including the expectations and obligations associated with the GII. I also highlight some of these points for purposes of clarity.

Should **IND A** accept and commit to the GII, the following conditions will apply to **IND A**.

- a) **IND A** agrees to provide the Bureau with full disclosure of all non-privileged information, evidence or records in **IND A**'s possession, under [his/her] control or available to him/her, wherever located, that, in any manner, relate to the anticompetitive conduct.
- b) **IND A**'s production of information and records within the disclosure process will be timely and will be completed within a schedule established between the Bureau and **IND A**, unless an exception to the schedule is warranted.
- c) **IND A** accepts its obligation to bear the cost of collecting and producing information and records within the disclosure process.
- d) **IND A** will cooperate with the Bureau as part of furthering the Bureau's investigation of the anticompetitive conduct. This cooperation includes providing truthful and accurate information, a willingness to assist investigators locate information that is most pertinent, as well as an obligation to update information and evidence promptly when **IND A** becomes aware of either new or corrected information or records.
- e) Unless made public by the DPP or the Commissioner, or as may be ordered by a Canadian court of competent jurisdiction, **IND A** shall not disclose the existence of this GII, nor the substance of the matter under investigation, without the consent of the DPP.

IND A should also understand that providing false or misleading information to the Bureau, failure to cooperate in accordance with its obligations under the GII and/or noncompliance with the terms and conditions of the GII or obligations under the Immunity Program, including eligibility requirements, can lead to revocation of the GII and possible charges under the Act or the *Criminal Code*.

Should **IND A** accept and commit to the GII, neither the Bureau nor the DPP will use any of the information disclosed by **IND A** against [him/her], unless [he/she] has been found to be ineligible for immunity or has otherwise failed to comply with the GII or obligations under the Immunity Program.

This offer of a GII is also premised on **IND A** having the intention to meet the obligations associated with the agreement in order to receive a grant of final immunity. The DPP will provide a grant of final immunity to **IND A** once [he/she] has satisfied all of its obligations under the GII, including, if necessary, testifying in court proceedings.

Should **IND A** agree with the content of this letter and [his/her] obligations as an immunity applicant, the DPP is prepared to provide **IND A** with a GII as a step toward [him/her] receiving final immunity from prosecution under the Act for the anticompetitive conduct described in the agreement.

Yours very truly,

PPSC counsel

I admit knowledge of (participation in) the anticompetitive conduct.

I am aware of the expectations and obligations associated with a GII and intend to meet those in order to receive a grant of final immunity.

IND A

Date

INDIVIDUAL – MODEL GII



Service des poursuites
pénales du Canada

Public Prosecution
Service of Canada

THIS AGREEMENT IS BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,

as represented by the

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA

- and -

INDIVIDUAL A

This document sets out the terms and conditions of an agreement between Her Majesty the Queen in right of Canada, as represented by the Director of Public Prosecutions of Canada [DPP] and **INDIVIDUAL A [IND A]** governing the grant of interim immunity from prosecution under the *Competition Act* [the Act].

This grant of interim immunity [GI] follows an application to the Commissioner of Competition [the Commissioner] pursuant to the Competition Bureau's *Immunity and Leniency Programs under the Competition Act* [Immunity Program] (attached as Appendix 1).

This grant of immunity relates to anticompetitive conduct contrary to ... section(s) ... of the Act with respect to...[brief outline of conduct in that is the subject of the application].

This agreement is conditional and depends upon **IND A** satisfying the terms and conditions set out below. This interim immunity will become final when **IND A** has met its obligations under this agreement and written acknowledgement of such has been issued by the DPP.

The parties agree and undertake as follows:

1. **Definitions:** In this agreement,

"anticompetitive conduct" means...[definition/description of anticompetitive conduct and its time frame that is covered by the immunity agreement];

"cooperation" means complete, timely and ongoing cooperation, at **IND A**'s own expense throughout, with the DPP and the Commissioner in connection with the investigation of the anticompetitive conduct and in any proceedings that may be instituted by the DPP in relation to the anticompetitive conduct, and as more fully described in paragraphs 3 through 4 of this agreement;

"confidential information" means this agreement and any information that in any way relates to the investigation of the anticompetitive conduct;

"disclosure", as used in paragraphs 3 through 4 of this agreement, means full, complete, frank and truthful disclosure of all non-privileged information, evidence or records relating to the anticompetitive conduct.

2. **Representations:** **IND A** represents that:

- a) he/she has reported to the Commissioner and the DPP that he/she has engaged in the anticompetitive conduct;
- b) he/she has taken effective steps to terminate his/her participation in the anticompetitive conduct;
- c) he/she has not coerced others to be a party to the anticompetitive conduct; and
- d) he/she has revealed to the DPP and the Commissioner any and all conduct of which he/she is aware that may constitute an offence under the Act.

3. **Cooperation and Disclosure:** **IND A** has provided and shall continue to provide as necessary disclosure and cooperation to the DPP and the Commissioner, including, but not limited to:

- a) all non-privileged information, evidence and records in his/her possession, under his/her control or available to him/her, wherever located, whether or not requested by the DPP or the Commissioner, that in any manner relate to the anticompetitive conduct. Before providing the information, evidence and records, **IND A** will consult with the Commissioner with respect to the relevance and scope of such information, evidence and records and the form in which such information, evidence and records will be provided to the Commissioner; and
- b) revealing any and all conduct of which he/she becomes aware that may constitute an offence under the Act.

4. **Immunity:** Having considered the recommendation of the Commissioner and, after an independent review pursuant to the policy of the DPP as set out in the PPSC Deskbook, conditional upon:

- a) the veracity of the representations contained in paragraph 2 above; and
- b) the disclosure by and cooperation as required pursuant to this agreement; and
- c) **IND A**'s compliance with the terms and conditions of this agreement;

the DPP grants **IND A** interim immunity from prosecution under the Act in respect of the anticompetitive conduct.

5. **Confidentiality:** The DPP and the Commissioner shall not disclose to any third party the identity of **IND A**, except where:

-
- a) disclosure is required by law;
 - b) disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
 - c) disclosure is necessary for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
 - d) **IND A** has agreed to disclosure;
 - e) there has been public disclosure by **IND A**;
 - f) disclosure is necessary to prevent the commission of a serious criminal offence; or
 - g) in the case of information other than **IND A**'s identity, where disclosure of such information is for the purpose of the administration or enforcement of the Act.
6. The DPP and the Commissioner shall not disclose to any third party information obtained from **IND A** subject only to the exceptions listed above.
 7. The DPP and the Commissioner shall not disclose the identity of **IND A** nor the information obtained from **IND A** to any foreign law enforcement agency without the consent of **IND A**, which consent will not be unreasonably withheld.
 8. Unless made public by the DPP, or the Commissioner, or as required by law, **IND A** shall not disclose confidential information to any third party, without the consent of the DPP, which consent will not be unreasonably withheld. Where disclosure is required by law, **IND A** shall give notice to and consult with the DPP prior to disclosure.
 9. If any third party seeks to compel disclosure of confidential information from any party to this agreement, the party from whom the information is sought shall give prompt notice to the parties to this agreement, and shall take all reasonable steps to resist disclosure unless the parties to this agreement consent to such disclosure.
 10. **Failure to Comply with this Agreement:** The parties agree that full compliance with all the terms and conditions in this agreement is fundamental to the agreement. The parties also agree that the accuracy and veracity of all representations required by this agreement by **IND A** is a condition of and fundamental to the agreement. Non-compliance with any of the aforementioned terms and conditions of this agreement by **IND A** constitutes a breach of the agreement which may result in revocation of interim immunity for **IND A** or such other remedy as the DPP may determine.
 11. **Grounds for Revocation:** If the DPP determines that **IND A** has misrepresented itself with respect to any of its representations under paragraph 2; has not provided the cooperation and disclosure required in paragraph 3; has not complied with any other terms and conditions of this agreement; or, obstructed, or attempted to obstruct justice; the DPP may revoke the interim immunity granted to **IND A** after fourteen (14) days prior written notice to **IND A** (or counsel for **IND A**) and, absent exigent circumstances, will provide **IND A** (or counsel) with an opportunity to meet within the aforementioned fourteen (14) days with the DPP regarding the potential revocation.
 12. Following revocation of interim immunity for a breach of this agreement, as described in paragraphs 10 and 11 above, the DPP may take such action against **IND A** as the DPP considers appropriate, including prosecution under the Act or the Criminal Code. In any such action the DPP may use, in any way, any information, evidence, record,

statement or testimony provided by **IND A** at any time after the application for immunity and any evidence of any kind derived directly or indirectly from such information, evidence, record, statement or testimony provided. For greater certainty, any privilege that may apply in respect of any information, evidence, record, statement or testimony provided is deemed waived upon revocation of immunity.

13. **Use of Statements:** No information, evidence, record, or statement provided during an interview by **IND A** will be used in evidence against him/her in any proceedings undertaken by or on behalf of the DPP except where **IND A**:
- a) subsequently gives in any trial, hearing, or judicial proceeding (including any proceeding in which **IND A** is an accused) evidence that is materially different from the statement given in an interview;
 - b) is charged with perjury, giving contradictory evidence, fabricating evidence or obstructing justice; or
 - c) has had its immunity revoked after a breach of this agreement.
14. Nothing in this agreement affects the right of the DPP or the Commissioner to use any information, evidence, record, statement or testimony provided by **IND A** under this agreement in order to discover or acquire other information, evidence, or records from another source.
15. **Privilege and Jurisdiction:** Nothing in this agreement, or any action taken pursuant to it, shall constitute:
- a) except for the deemed waiver mentioned in paragraph 12, a waiver of any privilege, by any party to this agreement; or
 - b) a submission to the jurisdiction of the Canadian courts by **IND A**, who is not present in Canada, except for the purpose of this agreement and proceedings related to the enforcement of this agreement. [if applicable]
16. **Applicable Law:** This agreement shall be construed in accordance with the laws of Canada.
17. **Entire Agreement:** This agreement constitutes the entire agreement between the DPP and **IND A**, and supersedes all prior understandings or agreements, if any, whether oral or written, relating to the subject matter of this agreement.
18. **Notices:** Any notice required to be given under this agreement is deemed to be validly given if in writing and by pre-paid registered mail, courier delivery, facsimile transmission or electronic mail (e-mail) transmission to:

- a) The Director of Public Prosecutions of Canada

Attention: Public Prosecution Service of Canada, Competition Law Section 160 Elgin Street
Place Bell Canada, suite 1400
Ottawa, ON K1A 0H8
CANADA

Attention:
[Insert name and contact information]

- b) The Commissioner of Competition

Attention: Senior Deputy Commissioner

Cartels and Deceptive Marketing Practices Branch
50 Victoria Street, 20th Floor, Place du Portage, Phase I
Gatineau, QC K1A 0C9
CANADA

Attention:
[Insert name and contact information]

c) **IND A**

Attention:
[Insert name and contact information]

d) With copy to:

Attention: Counsel for **IND A**
Counsel for **IND A**
[Address of **IND A**]

19. **Execution in Counterparts:** This agreement may be executed in counterparts.
20. **The Commissioner Joins in this Agreement:** The Commissioner joins in this agreement solely for the purposes of giving effect to his rights and obligations as set out in paragraphs 5 to 9 and paragraph 14.
21. **Authority and Capacity:** The DPP, **IND A** and the Commissioner each represent and warrant to the others that the signatories to this agreement on behalf of each party to it have all the authority and capacity necessary to execute this agreement and to bind the respective parties to it. **IND A** represents that it has had an opportunity to consult Canadian legal counsel in respect of this agreement.

The signatories acknowledge the full and voluntary acceptance of the foregoing terms and conditions.

Dated at _____ Her Majesty the Queen in right of Canada
as this this _____ day of _____, 20____, represented by the Director of Public Prosecutions of Canada

Per: _____
Counsel for the Public Prosecution Service of Canada

Dated at _____ The Commissioner of Competition
this _____ day of _____, 20____,

The Commissioner of Competition

Dated at _____
this _____ day of _____, 20____,

[insert name of IND A]